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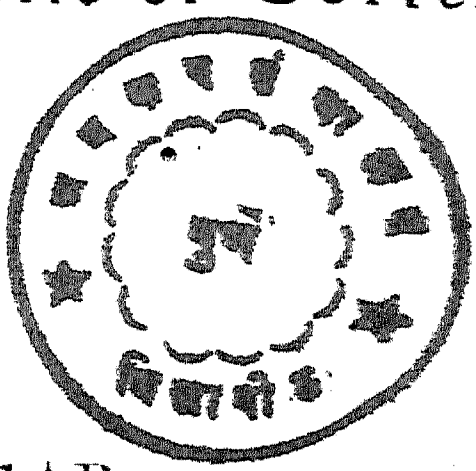
LAW OF TORTS.

SECOND (INDIAN) EDITION.

UNDERHILL'S
LAW OF TORTS

OR,

Wrongs Independent of Contract.



BY

M. KRISHNAMACHARIAR, M.A., M.L., PH.D.,

(Provincial Judicial Service.)

Vakil, High Court of Judicature, Madras; Member of the Royal Asiatic Society of London; Author of the Law of Execution in British India; Revised Edition of Agnew on Trusts (T.L.L. 1881), Revised Edition of Das on Ultra Vires (T.L.L. 1906), Commentaries on the Estates Land Act, Court Fees Act etc., etc.

SECOND (INDIAN) EDITION

Dr. S.K. Agrawala.

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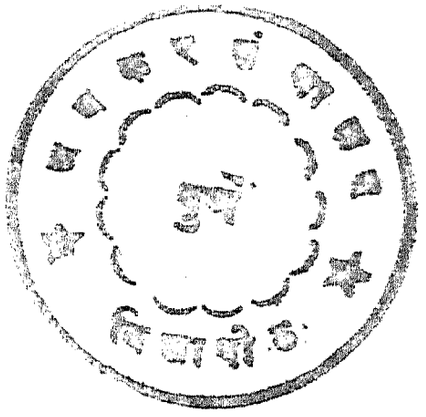
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EDITOR'S PREFACE.

In this Edition the arrangement of topics hitherto adopted has been retained. As a consequence of judicial decisions, some articles have been rearranged and the law there has been restated; but as far as possible, the present edition conforms to the latest English edition of the work by Mr. A. C. Hagon. An endeavour has been made to bring the references to all cases in India and to all cases of importance in the United Kingdom up to date. Since the first Indian edition of this work, the statutory literature on the Indian Law of Torts has been augmented by the enactment of the Copyright Act, 1914 and the Workmen's Compensation Act, 1923.

M. K.

EXTRACT FROM PREFACE

TO THE EIGHTH EDITION.

The fact that seven Editions of this Work have been sold, that an American firm have thought it worth their while to issue an unauthorised edition in the United States, and that a Canadian edition has been published, renders it no longer necessary to apologise for its existence.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a Treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law;, and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises then existing were for the practitioner, they were almost useless to the student. In the first place, to his unaccustomed mind they presented a mere chaos of examples, for the most part unexplained, and, in the absence of explanation, seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher* v. *Rylands* and *Nichols* v. *Marsland* for instance?

In the second place, the men are few indeed who can trust their memories to retain the contents of a large treatise with accuracy; and although that is not necessary, yet it *is* essential that they should accurately remember the *principles* of the law.

For these and other reasons, I ventured to write this work; and I still think that if a student will *thoroughly master* it, he will know as much of the *principles* of the Law of Torts as will suffice to make

him a competent general practitioner, and to pass him through his examinations so far as that subject is concerned.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases the practitioner who has any regard for the interests of his clients, or the reputation of himself, will turn to his digests and his reports; for however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enables him to apply these principles to complicated facts with ease and certainty.

* * * * * * *

ARTHUR UNDERHILL.

5, New Square, Lincoln's Inn, W.C.
1st June, 1905.

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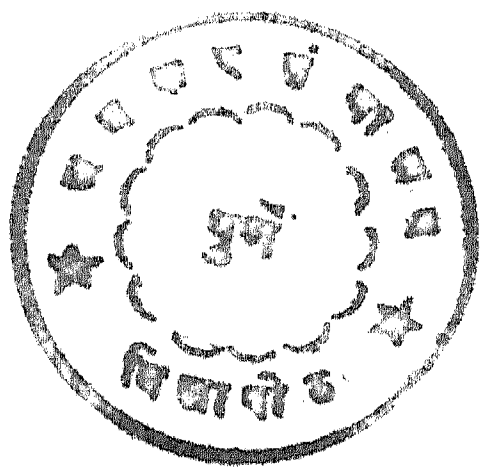
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THE LAW OF TORTS.



INTRODUCTION.

"The maxims of law," says Justinian, "are these: To live honestly, to hurt no man, and to give every one his due." The practical object of law must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and insuring to every member of the community the full enjoyment of his rights and possessions.

Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former consist of offences against the community at large, or offences—commonly called crimes—which, although primarily affecting individuals, are subversive of law and order; and as no redress can be given to the community, except by the prevention of such acts for the future, they are either stopped by injunction at the suit of the Attorney-General, or (in the case of crimes) visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are merely violations or deprivations of the legal rights of individuals. These admit of redress. The law, therefore, affords a remedy by forcing the wrongdoer to make reparation; and in some cases also restrains him by injunction from repeating the wrong.

But as injuries are divided into criminal and civil, so the latter are sub-divided into two classes, of injuries *ex contractu* and injuries *ex delicto*—the former being such as arise out of the violation of duties undertaken by contract, and the latter (commonly called torts) such

as spring from the violation of duties imposed by law, to the performance or observance of which every member of the community is entitled as against the world at large.

Although, however, these divisions are broadly correct, the border line between them is by no means well defined. Indeed, from the very nature of things, each division must to some extent overlap the others. Thus the same set of circumstances may constitute a crime, a tort, and a breach of contract. At the same time, as those circumstances may be regarded from each of the three points of view, no confusion ensues from the fact that they cannot be exclusively placed in any one of the three classes.

In this Work an attempt has been made to state the principles which the law applies to those facts which constitute torts.

INTRODUCTION TO INDIAN EDITION.

THE Law of Torts as administered in British India is essentially based on the Common Law of England. The Royal Charter that established the Mayor's Court at Calcutta in 1726 first introduced English Law into India. Later on in the history of the East India Company the charters of the various Courts of Justice that were from time to time established in the presidency-towns similarly introduced English Law, so far as it was suitable to Indian conditions and requirements. The Mayor's Courts, the Recorder's Courts and the Supreme Courts were all presided over by barristers from England. Under the regulations which guided the practice of these courts, the presiding judges were directed to act in accordance with "justice, equity and good conscience" in all cases where the personal laws of the parties were inapplicable. In following this direction, principles of English Law were invariably applied and followed, so that in time the Indian Law of Civil Wrongs has come to be a body of judge-made law, copied and augmented from English sources, with such changes and exceptions as the judges thought fit to adopt from equitable considerations. Towards the end of 1882, Sir F. Pollock was asked by the Government of India to prepare a draft of a bill to codify the Law of Civil Wrongs in India, but the measure stopped at that stage and did not pass into law. The applicability of the English Law of Torts to India is now subject to three limitations :

I—Statutory changes introduced into the English Common Law by Acts of Parliament after 1726 are in general inapplicable to India.

Illustrations.—(a) An imputation of unchastity or adultery to a woman which, under the common law, was not actionable without

proof of special damage, was by the Slander of Women Act, 1891, declared actionable *per se*. But according to the High Court of Calcutta the Common Law of England, as it prevailed in 1726, applies to natives of India within the limits of Calcutta, and an imputation of unchastity to a woman is not therefore actionable by itself, at least within the limits of the presidency-town.

(b) The doctrine of common employment which, under the common law, enunciated the absolute immunity of the master for injuries done to his servants by other servants, was considerably modified in England by the Employers' Liability Act, 1880. These modifications, however, do not affect the force of the doctrine in India. "It is perfectly clear in this country where there is no legislation analogous to the Employers' Liability Act that a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master, and this notwithstanding the fact that the nature of the employment of the servant suffering the injury and the servant whose neglect causes the damage, is very dissimilar."

II—Legislation in India has modified or superseded various rules of English Law.

Illustrations.—(a) The Judical Officers Protection Act does not recognise the distinction observed in English Law between superior and inferior courts, and limits the immunity of judical officers in India to certain specified circumstances.

(b) The Indian Contract Act, 1872, supersedes the English rule of "sale in overt market," and enacts that except in certain specified cases no seller can give to the buyer of goods a better title to those goods than he has himself.

(c) The Cattle Trespass Act, 1871, provides for the impounding of cattle and limits the right of distress *damage feasant* in this country.

(d) The Specific Relief Act, 1877, does not imperatively direct the grant of an injunction, where the remedy by way of damages can be considered adequate ; but under the English rule, a right to an injunction is a primâ facie right, and any person who has sustained material injury in respect of an easement is entitled to it.

(e) The Legal Representatives Suits Act, 1855, the Fatal Accidents Act, 1885, the Indian Succession Act, 1865, and the Probate and Administration Act, 1881, introduce exceptions to the Common Law rule of abatement of personal actions.

(f) The Indian Easements Act, 1882, and the Indian Limitation Act, 1908, introduce a number of changes in respect of the territories to which the Acts apply :

1. In England rights to light are acquired under the Prescription Act, but rights to air under the Common Law. In India rights to light and air are placed on the same footing and can be acquired by prescription.
2. In England the knowledge and acquiescence of the servient owner is necessary to create a right by prescription. In India ignorance of the servient owner would not operate as a bar.
3. The Indian Easements Act enacts that the extent of the prescriptive right to the passage of light or air to a certain window, door, or other opening, is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period, irrespective of the purposes for which it has been used. But in England, to give a right of action, the obstruction must be so great as to amount to a nuisance.
4. A right to undisturbed privacy is not recognised in English Law, but under the Indian Easements Act, it can be acquired by virtue of local custom.

(g) The Workmen's Compensation Act, 1923, defined the liability of employers for injuries caused to their servants in course of employment and fixed the standard of compensation.

III—Indian courts have in some cases laid down that particular rules or maxims of English Law are on equitable considerations inapplicable to India.

Illustrations.—(a) The English Law of Maintenance and Champerty is not in force as specific law in India.

* See *Abdul Hakim* v. *Tej Chunder*, 3 All. 815 ; *Naganatha Sastri* v. *Subramania Aiyer*, 32 M. L. J. 392 ; 40 I. C. 126.

(b) The rule of English Law, making it compulsory on a person, injured in his civil rights by an act which is also a felony or misdemeanor of a public nature, to prosecute the offender before bringing a civil action, is not applicable to India.

(c) The rule of English Law that a landlord, who has parted with his possesssion to a tenant, cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interest, does not apply to India, where tenures are in the nature of a partnership, in which the landlord participates with the cultivator in the crop.

(d) The English maxim "once a highway always a highway" is a legal fiction peculiar to English Law and cannot as a rule be applied in India.

Save so far as these limitations go and subject to the circumstance that the functions exercised in England by the Judge and the Jury individually are in India united in the Judge himself, the Law of Torts in India may be fairly presumed to be the same as in England.

PART I.

RULES RELATING TO TORTS IN GENERAL.

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CHAPTER I.

OF THE NATURE OF A TORT.

ART. 1.—*Definition of a Tort.*

A Tort is an act or omission which, independent of contract, is unauthorised by law, and results either—

(a) in the infringement of some absolute right to which another is entitled ; or

(b) in the infringement of some qualified right of another causing damage ; or

(c) in the infringement of some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally (*a*).

No one has yet succeeded in formulating a perfectly satisfactory definition of a Tort ; indeed, it may be doubted whether a scientific definition, which would at the same time convey any notion to the mind of the student, is possible.

Comment on various definitions of Tort.

A tort is described in the Common Law Procedure Act, 1852, as "**a wrong independent of contract**". If we use

(*a*) "A tort" says Innes, "is usually said to be a wrong independent of contract *i.e.*, the violation of a right independent of contract ; and it will be seen by this statement that the rights, of which a tort is a violation, *are*, in fact, distinct from those arising out of contract. But they are also *distinct from a vast variety of other rights* ; so that the usual definition is as defective as would be definition of the horse as '*a class of animal independent of horned cattle.*' A tort is an unauthorised prejudicial interference of some person by act or omission with a right *in rem* of another person." The conduct which brings about the prejudicial interference is said to be tortious.

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the word "wrong," as equivalent to violation of a right recognised and enforced by law by means of an action for damages, the definition is sufficiently accurate, but scarcely very lucid; for it gives no clue as to what constitutes a wrong or violation of a right recognised and enforced by law (*a*).

The Privy Council defined tort as "an act prejudicially affecting the person complaining in some legal right," and added that "it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining—that is, it must prejudicially affect him in some legal right; merely that it will, however, directly do him harm in his interest, is not enough" (*b*).

A tort may be described as a breach of a legal duty arising independently of contract and for which an action for damages can be maintained in a Court of Common Law.

It will be perceived from the above definition, that three distinct factors are necessary to constitute a tort according to our law:

(*a*) Perhaps Sir Frederick Pollock gives the most complete definition: "Every tort is an act or omission (not being merely the breach of duty arising out of a personal relation, or undertaken by contract) which is related in one of the following ways to harm (including interference with an absolute right whether there be measurable actual damage or not), suffered by a determinate person:

"(a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of;

"(b) It may be an act in itself contrary to law or an omission of specific legal duty which causes harm not intended by the person so acting or omitting;

"(c) It may be an act violating an absolute right (especially rights of possession and property), and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen, is an artificial extension of the general conceptions which are common to English and Roman law;

"(d) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented;

"(e) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits, to avoid or prevent."

(*b*) *Rogers* v. *Rajendro Datta and Others*, 2 W. R. P. C. 51; 8 Moo. I. A. 103.

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Examination of author's definition.

First, there must be some act or omission on the part of the person committing the tort (the defendant), not being a breach of some duty undertaken by contract.

Secondly, the act or omission must not be authorised by law, *i.e.*, not justifiable by law. If a sheriff enters on a man's land under due process of law to execute a writ of *fi. fa.*, his act, though an infringement of the right of property, is not tortious, because it is authorised by the judgment and writ of execution. So, too, an entry on land may be justified by necessity, or by its being done lawfully in the exercise of a right of way or by licence of the owner of the land. And trespasses to the person by beating or imprisonment may be justified by a sentence of a court of competent jurisdiction, and an assault may be justified by its being done in self-defence, or as reasonable chastisement by a parent or schoolmaster. In all these cases the acts done are primâ facie tortious, but are not actionable because they are authorised by law.

Thirdly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some loss of property, health, or material comfort.

One often sees it stated in legal works that a *damnum absque injuria* is not actionable, but that an *injuria sine damno* is.

Meaning of "*damnum*" and "*injuria*."

By *damnum* is meant damage in the sense of **substantial** loss of money, comfort, health, or the like. By *injuria* is meant an unauthorised interference, however trivial, with some right conferred by law on the plaintiff (*ex. gr.* the right of excluding others from his house or garden). All that the maxims come to, therefore, is this: that no action lies for mere damage (*damnum*), however substantial, caused without breach of a legal right; but that an action does lie for interference with another's absolute legal private right, even where unaccompanied by actual damage, *e. g.* a trespass (*a*).

Read by the light of these observations, both the maxims in question are correct. For the interruption of an absolute right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for

(*a*) *Entick* v. *Carrington* (1765), 19 Yt. Tr. 1066.

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reparation ; and substantial damages have more than once (in cases of false imprisonment) been awarded, where the plaintiff's surroundings were very considerably improved during his unlawful detention. But when no absolute private right has been invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

"There may be," said the Privy Council, "where a right is interfered with, *injuria sine damno*, sufficient to found an action ; but no action can be maintained where there is neither *damnum* nor *injuria*" (*a*).

Damnum absque injuriâ

Damnum absque injuriâ means damage without infringement of any legal right, and it is clear that this is not actionable, even though the damage is caused by an unauthorised act, such as a crime or breach of trust.

For instance, murder is an act unauthorised by law, and it may inflict most cruel and particular damage on the family of the murdered man ; but, nevertheless, at common law, that gives then no civil remedy against the murderer (*b*). So, if one libels a dead man, his children have no right to redress, although it may cause them to be cut off from all decent society, for, though a man has in a sense a right to his own reputation, he has none in the reputation of his father (*c*). So a breach of trust, although not permitted in equity, and usually followed by private and particular loss to the beneficiaries, is not an infringement of any legal right, and therefore cannot properly be said to constitute a tort.

So, where a land owner diminished the supply of water to the neighbouring owner by drawing, draining or diverting water percolating in subterraneous streams (*d*) ; where by the working of a mine and the consequent subsidence of surface, the rainfall percolated into an adjacent lower coal mine (*e*) ; where the owners of a canal or of a land erected a dam or a sea wall for protecting themselves from an overflow of water from a neighbouring river or the tidal waves of the sea and augumented the damage to their neighbours

(*a*) *Kali Kissen* v *Jadoo Lal*, 5 C. L. R. 101 ; 6 I. A. 190.
(*b*) See *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.].
(*c*) *Broom* v. *Ritchie* (1904), 6 F. 842, Ct. of Sess.
(*d*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349 ; *Acton* v. *Blundell*, 12 M. & W. 324 ; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.
(*e*) *Wilson* v. *Waddel*, 2 App. Cas. 95 ; *Smith* v. *Kenrick*, 7 C. B. 515 ; *Samuel Jacobus* v. *Daniel Wilhelmus*, 15 C. W. N. 569 ; 10 I. C. 460 P. C.

(*a*) ; where by the starting of a rival school the strength of the plaintiff's school was reduced (*b*) ; where after a decree for dissolution of marriage the wife of a peer continued the title of peeress (*c* ; where in exercise of statutory authority the road was diverted near the plaintiff's shop, and gasometer was erected so as to obstruct the view of his premises (*d*) ; where the defendant called his newly built villa by the name of the adjoining neighbour's lodge and was thus alleged to cause inconvenience and annoyance (*e*) ; where a bystander was burnt by a lighted firework thrown into a coach full of company and flung out again in necessary self-defence (*f*) ; where a person bound to offer food to the idol did not do so and indirectly caused loss to the servants of the temple (*g*) ; where the appearance of the defendant as a rival preacher attracted away voluntary offerings which otherwise would have been received by the plaintiff (*h*) ; where the defendant in a suit protracted the proceedings by groundless pleas and the plaintiff suffered by reason of such delay (*i*) ; where a pleader was not allowed to appear at an enquiry under s. 180 of the Criminal Procedure Code while he had no right to appear at such an enquiry (*j*) ; where by the building of a slaughter-house by the municipality the value of the plaintiff's house was diminished (*k*) ; **in all these cases it was held that no action lay.**

Injuria sine damno

Injuria sine damno means the infringement of a legal private right without actual damage, and for every such wrong to an absolute right there is remedy by action "*ubi jus ibi remedium.*"

Infringement of absolute private rights.

A man has an absolute right to his property, to the immunity of his person, and to his liberty. Thus, in actions

(*a*) *Nield* v. *London and North Western Rail. Co.*, L. R. 10 Ex. 4; 44 L. J. 15; *R.* v. *Pagham Commissioners*, 8 B & C. 355; 6 L. J. (o. s) 388; *Maxey Drainage Board* v. *Great Northern Rail. Co*, 77 J. P. 236; 106 L. T. 429: *Yhidramappa* v. *Mahomed Yusuf*, 22 Bom. L R. 1107.

(*b*) *Gloucester Grammar School Case*, Y. B. 11 Hen. 4, fo. 27, pl. 21, 23.

(*c*) *Earl Cowley* v. *Countess Cowley*, [1901] A. C. 450.

(*d*) *Butt* v. *Imperial Gas Co.*, L. R. 2 Ch. App. 158.

(*e*) *Day* v. *Brownrigg*, 10 Ch. D. 294.

(*f*) *Scott* v. *Shepherd*, 2 W. Bl. 822. 898 : 3 Wils. 403, at p. 411.

(*g*) *Dhadphale* v. *Gurav*, 6 Bom. 122.

(*h*) *Madhusudan Parvat* v. *Shree Madhav Theerth*, 33 Bom. 278; *Boyter* v *Dodsworth*, 6 T. R. 681.

(*i*) *Rawat Mall* v. *Ganu*, 3 C. P. L. R. 27.

(*j*) *Bindachari* v. *Dracup*, 8 B. H. C. R. (A. C. J.) 202.

(*k*) *Rattigan* v. *Municipal Committee of Lahore*, 106 P. R. 1888.

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of trespass whether to goods, lands, or the person (including assault and false imprisonment), actual damage is not an essential part of the cause of action, and a plaintiff is entitled to damages for the mere infringement of these rights.

"The principle ordinarily applied to actions of tort is, that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action" (*a*). Accordingly, wherever the plaintiff establishes some legal right or title in himself which has been invaded by the unlawful act of the defendant, there is legal damage resulting from it and in respect of it an action is maintainable, though no pecuniary loss can be proved (*b*). A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference (*c*).

So where the returning officer refused to register the plaintiff's vote, duly tendered and legally receivable, though the candidate for whom the vote was meant was in the end elected (*d*); where the plaintiff's goods were attached under an invalid order or were trespassed upon in an illegal distress for rent (*e*); or where property attached in execution was removed out of the custody of the Court (*f*); where a

(*a*) *Mohun Das* v. *Gokul Das*. 10 M. I. A. 563; *Bayliss* v. *Fisher*. 7 Bing. 153; followed in *Wilson* v. *Kanhyasahu*, 11 W. R. 143 (where ordinary damages were not allowed, as special damage was gist of the action); and in *Jagat Lal Chaudhri* v. *Tasadak Ali*. 25 W. R 548 (where the essence of the plaint was a demand for compensation for losses incurred, but no specific injury was proved as consequent on the act of trespass).

(*b*) *Ashby* v. *White*, 2 Ld. Raym. 938, at p. 955; *Bower* v. *Hill*. 1 Bing N. C. 549; 4 L. J. C. P. 153; *Rochdale Canal Co* v. *King*. 14 Q. B. 122; *Parashnath Saha* v. *Brajo Lal Gosain*, 8 W. R. 44 (where it was said that once the cause of action was established, the plaintiff was entitled to damages large or small); *Ram Chand Chakurbutty* v. *Nadiar Chand Ghosh*, 23 W. R. 230; *Kalliappa Kaundan* v. *Vyapuri Kaundan and Another*, 2 M. H. C. R. 442; *contra Samacharan Chatarji* v. *Boidonath Banerji*, 11 W. R. 2; *Nabakrishna Mukharji* v. *The Collector of Hoogli*, 2 B. L. R. A. C. 276; *Sitaram* v. *Kamir Ali*, 15 W. R. 250.

(*c*) *Quinn* v. *Leatham*, [1901] A. C. 495; *Rama Odayan and Others* v. *Subramanya Iyer*, 31 Mad. 171.

(*d*) *Ashby* v. *White*, *supra*.

(*e*) *Mohan Das* v. *Gokul Das*, *supra*; *The Walter D. Wallet*. [1893] P. 202; 62 L. J. P. 88; *Smith* v. *Enright*, 63 L. J. Q. B. 220.

(*f*) *Sankaralingareddi* v. *Kandasami Tevan*. 30 Mad. 413.

stream of water flowing through the plaintiff's land was diverted (*a*); where a tenant made material alterations in his tenement without the landlord's consent, though the alterations tended to improve the premises (*b*); where a banker, having funds of a customer in his hands, refused to honour his cheque (*c*); where an immemorial right to weigh goods and to collect weighment fees at a bazaar was obstructed (*d*); where the exclusive right to break a curd-pot in a temple or to officiate as a priest (*e*), or where the right to carry a procession through some public streets on some occasions (*f*) was infringed; where the defendant refused to deliver up an idol and prevented the plaintiff from performing his turn of worship (*g*); where a drain was wrongfully constructed upon the plaintiff's land without his permission (*h*); **in all these cases the wrongs were held to be actionable.**

Infringement of qualified private rights.

But there are some private rights which are only qualified rights, that is, rights to be saved from loss, and no action will lie for an infringement of these rights without proof of actual damage. Thus, a person has not an absolute right not to be deceived, and in an action for fraud it is necessary for the plaintiff to show that the deceit complained of resulted in damage. So, too, in actions for nuisance (with some exceptions), malicious prosecution and negligence, damage is an essential part of the cause of action; as in all these cases the right infringed is only a qualified right—a right to be preserved from damage by certain acts or omissions of other persons.

Infringement of public rights.

Lastly, a tort may consist in the infringement of a public right, *i.e.*, a right which all men enjoy in common, coupled with particular damage. Take, for example, rights of highway. If a highway is obstructed, an injury is done to the public, and for that wrong the remedy is by indictment or by proceedings by the Attorney-General on behalf of the public. If every member of the public could bring an action, the number of possible actions for one breach of

(*a*) *Embrey* v. *Owen*, 6 Exch. 353.
(*b*) *Cole* v. *Green*, 1 Lev. 309.
(*c*) *Marzetti* v. *Williams*, 1 B & Ad. 415.
(*d*) *Bhikhi Ojha* v. *Harakh Kundu*, 9 A. W. N. 89.
(*e*) *Narayan* v. *Balkrishna*, 9 B. H C. R. (A. C. J.) 413; *Limba Bin Krishna* v. *Rama Bin Pimplu*, 13 Bom. 548.
(*f*) *Andi Moopan* v. *Muthuveerareddi*, 29 M. L. J. 91; 29 I. C. 248.
(*g*) *Debendranath* v. *Odit Churn*, 3 Cal. 390.
(*h*) *Ramphail Sahu* v. *Misri Lal*, 24 W. R. 97.

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duty would be without limit (*a*). But if, in addition to the injury to the public, a special, peculiar and substantial damage is occasioned to an individual beyond the injury suffered by the public generally, then it is only just that he should have some private redress (*b*).

It will, therefore, be seen, that there must be an act or omission either causing (a) an infringement of some absolute private right, or (b) an infringement of a qualified private right resulting in damage or (c) an infringement of a public right resulting in substantial and particular damage to some person beyond that suffered by the public.

ART. 2.—*Ubi jus ibi remedium.*

A violation of every legal right (not being a breach of contract) committed knowingly and without lawful justification is a tort.

No wrong without a remedy.

Where a man has a right, he must "of necessity have a means to vindicate and maintain it ; and indeed it is a vain thing to imagine a right without a remedy ; want of right and want of remedy are reciprocal" (*c*) ; so that where there is no legal remedy there is no legal wrong (*d*).

Explanation.

"Any person who obtains possession however innocently, of the goods of another who has been fraudulently deprived of them, and disposes of them whether for his own benefit or for that of any other person, is guilty of a conversion" (*e*). "Every invasion of private property, be it ever so minute, is a trespass" (*f*).

An action for tort is the appropriate remedy for every infringement of right which is not a breach of contract : and as rights are infinitely various, so are torts.

(*a*) See *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316 ; *W. H. Chaplin & Co. Limited* v. *Westminster Corporation*, [1901] 2 Ch. 329.

(*b*) See *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662 ; *Fritz* v. *Hobson*, 14 Ch D. 542.

(*c*) *Ashby* v. *White*, *supra*.

(*d*) *Bradlaugh* v. *Gossett*, 12 Q. B. D. 271 ; *In re Hepburn, Ex parte Smith*, 14 Q. B. D. 394, 399.

(*e*) *Hollins* v. *Fowler*, L. R. 7 H. L. 757.

(*f*) *Entick* v. *Carrington*, 19 Ytr. Tr. 1066.

The rights, infringements of which constitute torts, include—

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Classification of rights.

(1) *Personal rights*, such as the right everyone has to have his person immune from damage. Infringements of his right give rise to actions for trespass to the person (assault and false imprisonment), and when the character or reputation is attacked to actions for libel and slander. An action for negligence also lies for personal injuries caused by the negligence of another.

(2) *Rights of property.*—These include rights in respect of corporeal and of incorporeal property. Infringements of these rights give rise to actions for trespass to land and goods, nuisance, conversion and detention of goods, infringements of trade marks and patent rights, interference with easements and franchises, trade obstruction, fraud, etc.

ART. 3.—*Of Volition and Intention in relation to the unauthorised Act or Omission.*

(1) The unauthorised act or omission must be attributable to active or passive volition on the part of the party to be charged, otherwise it will not constitute an element of a tort (*a*).

(2) Nevertheless a want of appreciation of its probable consequences affords no excuse; for every person is presumed to intend the probable consequence of his acts.

(3) *Want of knowledge that the unauthorised act or omission is an infringement of right, as a rule, affords no excuse.*

The student must carefully distinguish between the voluntary nature of the act or omission and the want of appreciation of its consequences. It would be obviously unjust to charge a man with damage caused by some inevitable accident, over which, or over the causes of which, he had no control. On the other hand, it would be highly dangerous to admit the doctrine, that a man who does an act, or makes an omission voluntarily, should be excused the consequences by reason of lack of judgment or of ignorance.

(*a*) See *Wear Commissioners* v. *Adamson*, 1 Q. B. D. 546 [C. A.]; *The Nitro-glycerine Case*, 15 Wall. 524.

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"I am inclined to consider the rule of law to be this," said POLLOCK, C.B., "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur" (*a*).

So if a man consumes the goods of another, thinking they are his own, or trespasses on another's land, erroneously believing that there is a right of way, he is liable for the wrongful act he has done, and it is no excuse that he believed he had a right to do the act complained of.

"Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent" (*b*),

Illustrations.

The following illustrations will, however, help to accentuate the difference better than pages of explanation:

(1) A newspaper published a defamatory article of a person described as "Artemus Jones." Neither the author of the article nor the editor knew that there was in existence a person of the name of Artemus Jones, and therefore they could not have intended to defame any particular person. In fact there was a barrister of that name to whom readers of the article might reasonably think the article referred. As the article was in fact defamatory of him, the publishers were liable, the injury to the plaintiff being the natural consequences of their publishing the article (*c*).

So, too, if a person makes a false defamatory statement of another, it is no defence that he believed it to be true (*d*).

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt. For the neglect to fence the shaft

(*a*) *Greenland* v. *Chaplin*, 5 Exch. 243.
(*b*) *Allen* v. *Flood*, [1898] A. C. I.
(*c*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*d*) *Ibid.*

was an unauthorised omission, and the fall of the plaintiff was the probable consequence of it (*a*).

(3) On the other hand, where a horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly and without any explainable cause bolted, and notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and knocked down the plaintiff, it was held that the defendant was not liable, as the accident was not attributable to any wrongful act or omission of the defendant or his servant (*b*).

(4) So, too, where a man accidentally shot another without intending to do so, and without being guilty of any negligence or want of care in the use of his gun, or where a servant broke his master's lamp and was not bound by special contract for liability for damages, it was held that no action would lie (*c*).

Art. 4.—*Malice and Moral Guilt.*

Except in the case of an action for malicious prosecution, evil motive is not an essential ingredient in tort.

An evil motive cannot make wrongful an act that would otherwise not be so (*d*).

A good motive cannot justify an act that would otherwise be wrongful (*e*).

Malice is either express or implied. Express malice is "malice in fact"; implied malice is "malice in law."

"Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a **wrongful act done intentionally without just cause or**

(*a*) *Indermaur* v. *Dames*, L. R. 2 C. P. 311; *White* v. *France*, 2 C. P. D. 308; *Norman* v. *G. W. Ry. Co.*, [1915] 1 K. B. 584; *Cox* v. *Coulson*, [1916] 2 K. B. 177 [C. A.]; *Pritchard* v. *Peto*, [1917] 2 K. B 173.

(*b*) *Manzoni* v. *Douglas*, 6 Q. B. D 145.

(*c*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86; *Steiert* v. *Kamma*, 3 P. R. 1891.

(*d*) *Bradford Corporation* v. *Pickles*; *Allen* v. *Flood*, [1898] A. C. 1; *Maxey Drainage Board* v. *G. N. Ry. Co.*, 106 L. T. 429.

(*e*) *Polhill* v. *Walter*, 3 B. & Ald. 114; *Consolidated Company* v. *Curtis*, [1892] 1 Q. B. 493.

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excuse . . . If I traduce a man whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? and I apprehend that the law recognises the distinction between these two descriptions of malice—malice in fact, and malice in law—in actions of slander" (*a*). Again, express malice is not necessarily malice in law, nor will malice in law justify an inference of express malice (*b*).

Before such an inference is drawn there must be an utter absence of good faith. A belief in good faith is an honest persuasion founded after fair inquiry and consideration, upon what might be mistakenly, either in law or in fact, considered a reasonable and probable ground in the judgment of a man of ordinary capacities (*c*). Law generally favours a presumption of innocence (*d*), but will infer malice from an unlawful act. "Where an act in itself indifferent, if done with a particular intent, becomes criminal, the intent must be proved and found; but where the act itself is unlawful, the proof of the justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent" (*e*). In some Indian cases, however, it has been laid down that such an inference of malice is but a matter of fact and not a rule of law (*f*), and in the absence of express malice the court was not bound to infer malice from want of reasonable and probable cause (*g*), but must judge every case by its own set of circumstances (*h*).

(*a*) *Bromage* v. *Prosser*, 4 B. & C. 247; *The Collector of Sea Customs, Madras* v. *Punniar Chidambaram*, 1 Mad. 89.

(*b*) *Jagat Lal Chaudhuri* v. *Tasadak Ali*, 25 W. R. 547.

(*c*) *Raghunada Rao* v. *Nadamuni Tatamayyangar*, 6 M. H. C. R. 423 (following *Pease* v. *Chaytor*, 3 B. & S. 620, and *Douglas* v. *Corbet*, 6 El. & Bl. 514); *Radha Prasad Singh* v. *Ram Jewan Singh and Another*, 11 W. R. 389.

(*d*) *Lautif Ali and Others* v. *Abu*, 15 W. R. 203.

(*e*) *Rex* v. *Woodfall*, 5 Burn, 2667.

(*f*) *Raghunada Rao* v. *Nadamuni Tatamayyangar*, *supra*; *Goday Narayan Gajapati* v. *Sri Ankitam Venkata Garu*, 6 M. H. C. R. 85.

(*g*) *Goutiere* v. *Robert Charrial and Others* All H. C. R. (1870), p. 353.

(*h*) *The Collector of Sea Customs, Madras* v. *Punniar Chidambaram*; *Goday Narayan Gajapati* v. *Sri Ankitam Venkata Garu*, *supra*.

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It is true to say of some acts that they are not tortious unless done maliciously, provided that the term "maliciously" is used in its strict legal sense. But malice in its popular sense has very little to do with the law of torts, and no action can ever be brought for a **lawful act** although done out of malice.

Thus, if A. intentionally and without just cause or excuse induce B. to break his contract of service with C., and damage results to C., A. commits a tort and may be sued by C., and it is immaterial whether A. is influenced by good or bad motives (*a*). He may honestly think he is acting in the best interests of B. and C. His motive is then good ; there is no "malice" in the sense of ill-will ; but the act is malicious in the legal sense (*b*).

But if A. by lawful means induces B. not to enter into a contract of service with C., A. commits no wrong, and C. has no cause of action however much damage he may suffer. and although A. may be acting from the most wicked and selfish motives ; for A.'s evil motive does not make wrongful his act which, apart from motive, is not a tort (*c*).

So, too, a man has a right to pump underground water from the subsoil under his own land. And this act being itself lawful is not actionable though done spitefully for the purpose of injuring his neighbour (*d*).

Malicious prosecution and libel.

The one kind of action in which evil motive is a necessary ingredient is malicious prosecution, and there is an apparent exception in the case of libel and slander. As to these, see *post*, Arts. 57 and 63.

Negligence.

Even negligence involves no moral guilt. The state of mind of the defendant is immaterial. The only question is, What has he done or left undone ? Has he acted as a reasonable and prudent man would do in the circumstances ? Not, has he done what he thought was the best thing to do ? The law pays no regard to the moral culpability of the defendant, but considers only whether his conduct has

(*a*) *Quinn* v. *Leathem*, [1901] A. C. 495 ; *Long* v. *Smithson*, 118 L. T. 678 ; *Hodges* v. *Webb*, [1920] 2 Ch. 70.

(*b*) Note the limitation put on this liability by the Trade Disputes Act, 1906, S. 3, and see *Conway* v. *Wade*, [1909] A. C. 506 ; *Vacher & Sons, Ld.* v. *London Society of Compositors*, [1913] A. C. 107 ; *Larkin* v. *Long*, [1915] A. C. 814.

(*c*) *Allen* v. *Flood*, [1898] A. C. 1 ; *Stott* v. *Gamble*, [1916] 2 K. B. 504 ; *Davies* v. *Thomas*, [1920] 2 Ch. 189 ; *White* v. *Riley*, [1921] 1 Ch. 1.

(*d*) *Bradford Corporation* v. *Pickles*, [1895] A. C 587.

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been reasonable and prudent as judged from the standpoint of the average man.

Fraud.

It is said, indeed, that in order to constitute fraud there must be some moral turpitude; and in a sense this is true. Actionable fraud consists in the making of an untrue statement, with the intention of deceiving and with knowledge that it is untrue, or, absolutely recklessly without caring whether it is true or untrue. The man who does this is no doubt in most cases morally guilty; but it is conceivable that a man may, from the highest motives and honestly believing that he is doing right, make a statement which he knows to be untrue, intending that that statement should deceive. Nevertheless his conduct, though possibly morally justifiable, is inexcusable in law.

When, therefore, in the law of torts the phrase "malice" is used, it must be understood in its legal sense, *i.e.*, as meaning a wrongful act done intentionally without just cause or excuse. Only in connection with malicious prosecution has it a different meaning, and there, as will be seen hereafter, it does not necessarily mean ill-will against a person.

ART. 5.—*Of the connection of the Damage with the unauthorised Act or Omission.*

When the cause of action is for actual damage, the unauthorised act or omission must be shown to have been an **effective cause** of the damage, but not necessarily the immediate cause, that is to say, the damage must be such as would in the ordinary course of events flow from the unauthorised act or omission, as a natural and probable consequence.

First. Where there is a chain of causation between the wrongful act or omission and the damage, the wrongdoer is answerable only for such damage as does, in the ordinary course of events and under the existing causes, follow from the wrong (a).

(a) *Gerhard* v. *Bates*, 2 E & B. 476: *Sharp* v. *Powell*, L. R. 7 C. P. 253; *Smith* v. *Green*, 1 C. P. D. 92; *Halestrap* v. *Gregory*, [1895] 1 Q B. 561.

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Illustrations.

(1) The defendant, in breach of the Metropolitan Police Act, 1839, washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. If it had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. It was held that the defendant was not liable, as it was not the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance (*a*)

(2) The plaintiff was riding a bicycle on a highway on the footpath of which was a fowl belonging to the defendant. The fowl was frightened by a dog and flew between the spokes of the bicycle wheel. Assuming it was a wrongful act to let the fowl be on the footpath, it was not a natural or probable result of its being there that it should fly between the spokes of the cyclist's wheel and upset him (*b*).

(3) Where in a suit for possession of idols, the plaintiff claimed damages for loss of voluntary payments, which could have been received by him during the period of wrongful dispossession (*c*); where the plaintiff sued for *wasilat* in respect of profits in the shape of voluntary offerings derived from a turn of worship (*d*); where in a suit for damages for trespass and wrongful dispossession

(*a*) *Sharp* v. *Powell*, *supra*.

(*b*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345; *Jones* v. *Lee*, 106 L. T. 123.

(*c*) *Ramessur Mookerjee* v. *Ishanchander Mookerjee*, 10 W. R. 457.

(*d*) *Kasi Chandra* v. *Kailash Chandra*, 26 Cal. 356 (following 10 W. R. 457); *contra*, *Dinonath* v. *Pratap Chandra*, 27 Cal. 30, and *Bheemacharyulu and Others* v. *Kothakota Ramanujacharyulu*, 17 M. L. J. 493 (where it was held that suits for share of voluntary offerings pertaining to the offices of shebait and archaka were maintainable); likewise *Yeshwant Rao* v. *Bhaskar Rao Patwari*, 3 N. L. R. 47 (where a hereditary Joshi was allowed to recover marriage fees from an intruder); but see *Kali Kanta Sarma* v. *Gauri Prasad Sarma Bardeuri*, 17 Cal. 906 (where suit for regular offerings made out of the temple funds and not being of a voluntary nature was held good.)

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of a pagoda, the plaintiff claimed, *inter alia*, the costs incurred in criminal proceedings, instituted by the plaintiff in respect of the same matter (*a*); where in a suit to maintain the boundaries of a ferry the plaintiffs alleged that the order of a magistrate extending the boundaries of a public ferry was injurious to them, and claimed compensation for damage done to the plaintiffs by passengers trespassing on their lands on their way to the ferry (*b*); where in an action for breach of charter-party the plaintiffs claimed as damages against the owner of the ship the interest paid by them on the drafts in accordance with their arrangement with the Comptoir de Escompte, the amount they had to pay in renewing the drafts, interest due on sundry drafts which they could not negotiate, and the value of the stamps on the drafts which were cancelled in accordance with the arrangement between the plaintlff and the Comptoir de Escompte (*c*); where for trespass on their cotton plantation the defendants seized and detained in their possession the plaintiff's cow which suddenly died in their custody, and the plaintiff sought to recover its value (*d*): **in all these cases the damages were held to be too remote.**

(4) In another case the defendant wrongfully left a house-van and steam plough for the night on the grassy side of a highway. During the evening a mare which was being driven on the highway in a cart was frightened by the house-van and plough. The mare was a kicker, but the driver did not know she was. She shied, kicked, galloped away kicking, got her leg over the shaft and fell, and kicked the driver as he fell out of the cart. The driver was killed, and it was held that his death followed directly from the unauthorised act of the defendant. The mare being a kicker, her running away and the accident to the driver was not an unnatural or improbable consequence of her being frightened (*e*).

(5) Defendants' vessel, owing to the negligence of their servants, struck on a sandbank, and becoming from that cause unmanageable was driven by wind and tide upon a sea-wall belonging to the plaintiffs, which it damaged :— *Held*, that the negligence of the defendants' servants was the effective cause of the damage to the sea-wall; for it

(*a*) *Venkatesa Naicker and Nine Others* v. *M. Srinivasachariar*, 4 M. H. C. R. 410.
(*b*) *Ram Govind* v. *Magistrate of Ghazeepoor*, 4 N. W. P. 146.
(*c*) *Robert and Charrial* v. *Isaac*, 6 B. L. R. App. 20.
(*d*) *Mi Taw* v. *Nga Ket*, U. B. R. T., p. 1.
(*e*) *Harris* v. *Mobbs*, 3 Ex. D. 268.

put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the combined effect of wind and tide would at the moment take it, and this was towards the sea-wall (*a*).

(6) Where in consequence of the stoppage of immemorial outlets for surface drainage water the plaintiff's land was flooded and crops destroyed and the landlord claimed the loss of rents as damages (*b*); where owing to the cutting of the bank of reservoir the land was flooded and the cultivators claimed as damages the profits which they would have realised by cultivation (*c*); where the defendant kept the plaintiff out of possession of his land, cut down all the fruit-bearing and timber trees, and damages for prospective loss were claimed (*d*): **in these cases damages were held not to be too remote.**

Secondly. Where an act of a third person intervenes between the wrongful act or omission and the damage, the wrongful act or omission is the effective cause if what the third person does is what such a person would naturally be expected to do in the circumstances (allowing for the frailty of human nature), but not otherwise (*e*).

(1) In one case a cart was left unattended and a child seven years old got upon the cart in play, another child led on the horse and the first child was thereby thrown out and hurt. The owner of the cart was held liable, as it was a natural thing for children in such circumstances to play with an unattended cart (*f*). And where a driver of a van left it in charge of a tail-boy who drove on and came into collision with the plaintiff's carriage, it was held that the driver's leaving the cart in charge of a boy was the effective cause of the damage; what else could be expected of a boy than that he should try to drive the van? (*g*).

(2) Where a gas company supplied a defective service pipe which leaked, and a gasfitter employed to test it went

(*a*) *Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204.

(*b*) *Mussamut Anandmoyee Dossee* v. *Mussamat Hameedoonissa* (1862) Marsh, 65; *Ramchandra Jana* v. *Jeevan Chandra Jana* 1 B. L. R. (A. C. J.) 203.

(*c*) *Panan Singh* v. *Meher Ali*, W. R. (1864) 365.

(*d*) *Kumari Dasi* v. *Bama Sundari Dasi*, 10 W. R. 202.

(*e*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.]; *Rickards* v. *Lathian*, [1913] A. C. 263; *Ruoff* v. *Long & Co.* [1916] 1 K. B. 155.

(*f*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*g*) *Engelhart* v. *Farrant*, *supra*.

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to look for the leak with a lighted candle, and an explosion resulted, it was held that the explosion was the direct consequence of the defendants' negligence in supplying a defective pipe (*a*).

(3) But when a railway van was left by a railway company safely on a siding, locked, braked and coupled to a train, and mischievous boys trespassed on the siding and uncoupled the van and set it running down a slope so that it crossed a level crossing and injured the plaintiff, it was held that the company were not liable, as they could not reasonably have anticipated what actually happened (*b*). And in another case a drunken cabdriver, who fell asleep inside his cab, was held not liable for damage caused by another drunken cabdriver getting on to the box of his cab and driving away for his own pleasure. If the first drunken driver had thought about it at all he would not have thought of another drunken driver getting on his box and driving off (*c*).

(4) In the famous squib case the facts were that a person wrongfully threw a squib on to a stall at a fair the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away, and finally exploding, blinded the plaintiff. The liability of the person who originally threw the squib was in question, and DE GREY, C.J., said: "It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*d*).

(5) Where the defendant had wrongly though honestly arrested the plaintiff and charged him with an offence before a magistrate, who thereupon remanded him in custody, it was ruled that, although the defendant was liable for the original arrest in as much as it was his own wrongful act, he was not responsible for the subsequent remand which was merely the erroneous act of the magistrate (*e*). Accordingly,

(*a*) *Burrows* v. *March Gas and Coke Co.*, L. R. 7 Ex. 96.

(*b*) *Mc Dowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331; *Clark* v. *Chambers*, 3 Q. B. D. 327; *Wheeler* v. *Morris*, 113 L. T. 644 [C. A.]

(*c*) *Mann* v. *Ward*, 8 T. L. R. 699 [C. A.]

(*d*) *Scott* v. *Shepherd*, 2 W. B. L. 892 [C. A.]

(*e*) *Lock* v. *Ashton*, 12 Q. B 871; *Brown* v. *Chapman*, 6 C. B. 365. See also *West* v. *Smallwood*, 3 M. & W. 418; *Carrat* v. *Morley*, 1 Q.B. 18; *Austin* v. *Dowling*, L. R. 5 C. P. 534.

where the magistrate, apprehending breach of the peace regarding possession of certain land, initiated proceedings under the Criminal Procedure Code and attached the property in dispute, in consequence of which the plaintiff's land was left uncultivated, it was held that no suit for damages lay in that respect against the other party, as the non-cultivation was not the probable consequence of the defendant's wrongful act, but of the interposing judicial act proceeding from the magistrate (*a*).

(6) Similarly, if a person desires to obtain a judicial decision from a proper tribunal and for that purpose states the fact to a police officer, and the latter, acting on his own initiative, arrests the person implicated, no trespass is committed by the person who gives the information to the police officer (*b*) ; but, where the defendant made a wilfully false statement with a malicious intent, and as a consequence of such statement criminal proceedings followed, he was held liable (*c*).

ART. 6.—*The Act or Omission must be unauthorised.*

(1) An act or omission which is primâ facie tortious is not actionable if it is done under some lawful excuse.

(2) Among lawful excuses are that the act or omission is :

(i) An Act of State ;
(ii) A judicial act ;
(iii) An executive act ;
(iv) An act or omission authorised by statute ;
(v) An act or omission done by leave and licence.

(*a*) *Ammani Ammal*, v. *Sellayi Ammal*, 6 Mad. 426 ; *Mina Kumari Bibi* v. *Surendra Narain Chakravarty*, 10 C. L. J. 226 ; 14 C. W. N. 96 ; 3 I. C. 12 ; *Mackay* v. *Cave*, 9 I. C. 137. See also *Rajbullab Gope* v. *Issan Chandra Hujrah*, 7 W. R 355.

(*b*) *Sewell* v. *National Telephone Co*, [1907] 1 K. B. 557 ; *Narasinga Row* v. *Muthaya Pillai*, 26 Mad. 362 ; *Balbhaddar Pande* v. *Basdeo Pande*, 29 All. 44.

(*c*) *Bandi* v. *Rama Din*, 6 A. L. J. 516 ; 2 I. C. 424 ; *Joykalee Dassee* v. *The Representative of Chandmalla*, 9 W. R. 133 ;

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Explanation.

Besides these excuses there are others of a more special character, which are dealt with in connection with those torts in relation to which they generally arise (*a*).

The general excuses above enumerated are shortly explained in the following Articles. Some of them are more fully explained in later portions of this work.

ART. 7.—*Act of State.*

No action can be brought for damage resulting from an Act of State, whether the transaction constituting an Act of State be one between two independent States or between a State and an individual foreigner (*b*).

By an "Act of State" is meant (a) "an act done or adopted by the prince or rulers of a foreign independent state in their political and sovereign capacity and within the limits of their *de facto* sovereignty; (b) an act injurious to the person or to the property of some person **who is not at the time of that act a subject of her Majesty**; which act is done by any representative of her Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by her Majesty" (*c*). Acts of State are of two kinds: (1) Those which are transactions between two independent states, such as wars, treaties, annexation of territory, and so forth. An individual who suffers from such transactions has no cause of action, whatever other remedy he may have. (2) Those which are transactions between a state (*i.e.*, the government of this or any other country) and an individual foreigner.

The Privy Council laid down the principle of the rule as well as the test of its applicability. "The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding

Bhul Chand Patro v. *Palun Bas*, 12 C. W. N. 818n.; *Hari Charan Sant* v. *Koilash Chandra Bhuyan*, 12 C. W. N. 817.

(*a*) *E.g.*, parental authority, private defence, act of God, exercise of common rights.

(*b*) Halsbury's Laws of England, Vol. I., pp. 14, 15.

(*c*) Stephen's History of Criminal Law, Vol. II., p. 61.

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what is right, nor the power of enforcing any decision which they make" (*a*). "The test whether an act is or is not an act of State excluding the jurisdiction of the courts, is, not whether it is capable by being legally performed only by persons specially empowered in that behalf as authorised by law to perform special acts of government, but whether it is an Act of State in those external relations, which municipal or positive law addressed by political superiors to political inferiors does not profess to regulate. An Act of State in respect of which the jurisdiction of the courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrable by law, but which must rest for its jurisdiction on considerations of external politics and interstatal duties and rights" (*b*). The confiscation of property and annexation of territory by the British Government as a sovereign power have been held to be Acts of State (*c*), and consequently liabilities and incumbrances created by the outgoing rulers are not enforceable against the conquering power (*d*). Acts of the Governor-General or political agent in his political capacity are Acts of State (*e*). Subsequent ratification is equivalent to previous authority and will render acts, otherwise unauthorised, Acts of State (*f*). A British Court is not bound to accept the

(*a*) *Secretary of State for India in Council* v. *Kamatchi Boyee Sahaba*, 4 W. R. 42 [P. C.]; 7 M. I. A. 476.

(*b*) *Jehangir* v. *Secretary of State*, 6 Bom. L. R. 131.

(*c*) *Secretary of State for India in Council* v. *Kamatchi Boyee Sahaba*, *supra*; *Sardar Bhagwan Singh* v. *Secretary of State for India*, 2 I. A. 33; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613; *Saligram* v. *Secretary of State for India in Council*, 7 P. R. 1867 (affirmed 2 P. R. 1872); *Secretary of State for India in Council* v. *Wagentrieber*, 6 P. R. 1867; *East India Company* v. *Syed Ally*, 7 M. I. A. 555; *Nabob of Carnatic* v. *East India Company*, 1 Ves. Junr. 371; 2 Ves. Junr. 56; *Raja of Coorg* v. *East India Company*, 29 Beav. 300; *Beedrichund* v. *Elphinstone*, 1 Knapp P. C. 316; *Ex parte D. F. Marais*, [1902] A. C. 109.

(*d*) *Doss* v. *Secretary of State for India*, L. R. 19 Eq. 509; *West Rand Central Gold Mining Co.* v. *Rex*, [1905] 2 K. B. 391; *Raja Saligram* v. *Secretary of State for India*, 18 W. R. 389; 12 B. L. R. 167.

(*e*) *Inhabitants of Mahalingapore* v. *Anderson*, 7 B. L. R. 452; *In re Maharaja Madhav Singh*, 32 Cal. 1; 31 I. A. 239 (where a native ruler was deposed by an order of the Viceroy in Council.

(*f*) *Buron* v. *Denman*, 2 Exch. Rep. 167; *Secretary of State for India in Council* v. *Kamatchi Boyee Sahaba*, *supra*; *Mir Zulif Ali* v. *Yeshvadbai*, 9 B. H. C. R. 314.

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act of the governor of a foreign State as an Act of State (*a*), but cannot question the validity of an act of a sovereign prince in his own State (*b*).

"As between the sovereign and his subjects there can be no such thing as an Act of State." Where the act complained of is professedly done under colour of legal title or under the sanction of municipal law, the jurisdiction of the civil courts cannot be taken away (*c*). So if one British subject destroys the property of another by the express command of the king, that command is no defence in an action of tort, "for courts of law are established for the express purpose of limiting public authority in its conduct towards individuals" (*d*). And an Act of State cannot be pleaded where the plaintiff is an alien but resident in the king's dominions (*e*).

(*a*) *Bombay Burma Trading Corporation* v. *Mirza Mahomed Ali Shirazee*, 10 B. L. R. 345.

(*b*) *Samarendra Chandra Deb Barman Bara Thakur* v. *Birendra Kishore Deb Barman*, 35 Cal. 777; following *Beer Chunder Manickya* v. *Raj Kumar Nabodeep Chunder Deb Burmono*, 9 Cal. 535.

(*c*) *In re Ameer Khan*, 6 B. L. R. 392 (where the arrest and detention of a person under a warrant of the Governor-General in Council were held to be not acts of State); *Forester* v. *Secretary of State for India*, 12 B. L. R. 120; 18 W. R. 349 (where the legality of the resumption of lands, previously held from the Government under a particular tenure, upon the alleged determination of that tenure was in question); *Ellaiya* v. *Collector of Salem*, 3 M. H. C. R. 59 (where the collector's power to determine any tenure and to increase the rent arbitrarily was questioned, and it was decided that the lands could be resumed only on the breach of the condition attached to the holding); *Jehangir* v. *Secretary of State for India in Council*, *supra* (where defamatory statements made of an official in a Government resolution were held to be not acts of State); *Secretary of State* v. *Hari Bhanji*, 5 Mad. 273 (where a sum of money illegally extracted as import duty on salt was recovered); *Vijia Raghava* v. *Secretary of State for India in Council*, 7 Mad. 466 (where a suit for damages by a municipal councillor for wrongful removal from office against the Government was allowed); *Collector of Kaira* v. *Modee Pestonjee*, 2 M. I. A. 37 (where the Imam was seized by the *mamlatdar* and was consequently an act of the individual not of State); *Sujan Singh* v. *Secretary of State for India*, 56 P. R. 1876; but see *Nobin Chandra De* v. *Secretary of State for India*, 1 Cal. 11 (where the refusal of excise authorities to grant licences for shops and to return the deposits made in respect thereof was held to be acts of State).

(*d*) *Walker* v. *Baird*, [1892] App. Cas. 491.

(*e*) *Johnstone* v. *Pedlar* [1921] W. N. 229 [H. L.]

Art. 8.—*General Immunity of Judicial Officers.*

(1) No action lies against a judge of a *superior* court in respect of any act done by him in his judicial capacity, even though he acts oppressively, maliciously, and corruptly (*a*).

(2) No action lies against a judge of an *inferior* court in respect of any act done by him *within his jurisdiction* (*b*).

(3) A judge of an inferior court is liable for anything he does in his judicial capacity **but without his jurisdiction if he knew or had the means of knowing** facts which would show that he had not jurisdiction (*c*).

(4) In India no action lies against a judicial officer for any act done, or ordered to be done, by him in the discharge of his judicial functions, whether or not within the limits of his jurisdiction, provided that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; nor against the officer of any court or other person bound to execute the lawful warrants or orders of any such judicial officer for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same (*d*).

The Supreme Court of Judicature (including the Court of Appeal and all the divisions of the High Court of Justice) is a superior court, as also are Assize Courts.

(*a*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668 [C. A.].

(*b*) *Doswell* v. *Impey*, 1 B. & C. 163, 169; *Houlden* v. *Smith*, 14 Q. B. 841.

(*c*) *Calder* v. *Halket*, 3 Moo. P. C. 28.

(*d*) Act XVIII of 1850, s. 1.

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Inferior courts include county courts, the mayor's court, quarter sessions, petty sessions, and the court of a revising barrister.

It will be observed that the protection given to Judges covers not merely what they do *lawfully*, as when they sentence convicted criminals to imprisonment, but also in many cases what they do *unlawfully*, as if a Judge sentences an innocent person to imprisonment.

If it were not for the rule now under consideration a Judge would be liable to an action for assault or false imprisonment if he ordered the arrest of or sentenced to imprisonment an innocent person. So too, Judges cannot be sued for slander in respect of defamatory words uttered by them in their judicial capacity.

It will be noticed that though a judge of a superior court is protected, provided the judge is acting in his judicial capacity, in the case of a judge of an inferior court (*a*) the protection only extends to acts done by him **within his jurisdiction**. But if he exceeds his jurisdiction, as by sentencing a prisoner for an offence over which he has no jurisdiction, or in a place where he has no jurisdiction, although he acts in his judicial capacity, he is not protected, and may be sued for trespass.

The protection of the rule, however, extends to all cases in which **upon the facts before him** he would have jurisdiction. If on the facts as they are brought before him a judicial officer has jurisdiction, he is excused, even though when all the facts are known it is seen that he has none. But if he has before him facts from which he **knew or ought to have known** that he had no jurisdiction, he is not protected. If he assumes jurisdiction when in fact he has none by shutting his eyes to the facts, or by reason of his ignorance of the law, he is liable for any tort he commits in excess of his jurisdiction (*b*).

Illustrations.

Where the judge of the Supreme Court of Trinidad and Tobago caused the plaintiff to be imprisoned in default of finding bail, and the jury found that he had overstrained his judicial powers and had acted in the administration of

(*a*) It is not quite clear that the full measure of protection extends to inferior courts not of record (such as justices of the peace), but see the Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1, and *Pease* v. *Chaytor*, 3 B & S. 620.

(*b*) *Houlden* v. *Smith*, 14 Q. B. 841; *Willis* v. *Maclachlan*, 1 Ex D. 376. See *Haggard* v. *Pelicier Freres*, [1892] A. C. 61 [P. C.]; *Quinn* v. *Pratt*, [1908] 2 Ir. R. 69.

justice oppressively and maliciously, and to the prejudice of the plaintiff and the perversion of justice, the Court of Appeal held that, nevertheless, no action lay. (*a*).

But where a police magistrate fined a person for not causing his child to be vaccinated and issued a distress warrant in default of payment, he was held liable as the summons itself showed he had no jurisdiction, the prosecution being more than six months after the offence (*b*).

The protection afforded to judicial officers under the Judicial Officers Protection Act (XVIII of 1850) rests on grounds of public policy. "A contrary system would produce great inconvenience by allowing every losing party of whom there must be one in every suit, bringing an action against the judge, and of the judge in his turn, if unsuccessful, suing the other judge who had pronounced against him" (*c*). The scope of this protection is, however, limited both as to the nature of the act and as to jurisdiction in action :

Act VIII of 1850.

(i) The act must have been done or ordered to be done in the discharge of judicial and not ministerial functions (*d*).

(ii) If the judicial officer has acted within the limits of his jurisdiction, the protection is absolute and no question of good faith arises (*e*).

(*a*) *Anderson* v. *Gorrie*, [1895] 1 Q. B 668 [C. A.].

(*b*) *Polley* v. *Fordham*, 91 L. T. 525. The case is reported on another point, [1904] 2 K. B. 345.

(*c*) *Girjashankar* v. *Gopalji*, 30 Bom. 241 ; *Maung Myat Min* v. *Maung Waik*, L. B. R. (1872—1892) 83.

(*d*) *Deputy Magistrate of Katwa* v. *Brojo Ballab Gui*, 14 B. L. R. 254 ; 21 W. R. 126, 391 (where the removal of an obstruction in the exercise of powers under the Bengal Act VI of 1868 was said to be not a judicial act) ; *Inhabitants of Mahalingpore* v. *Anderson*, *supra* (where the act of the political agent was a political act) ; *Sinclair* v. *Broughton*, 9 Cal. 341 ; 9 I. A. 152 (where the arrest did not purport to be a police function under the Lunatic Asylums Act) ; *Clarke* v. *Brojendra Kishore Roy*, 36 Cal. 433 (where the issue of a search warrant was held to be an executive act, BRETT, J., dissenting) ; reversed on appeal, *Clarke* v. *Brojendra Kishore Roy*, 39 Cal. 953 (where it was held to be a judicial function).

(*e*) *Meghraj* v. *Zahir Hossein*, 1 All. 280 ; *Parankusam* v. *Stuart*, 2 M. H C. R. 396 (where the acceptance and refusal of bail was said to be a judicial duty, and no action would lie for any mistake in its performance ; but *contra*, *Q.* v. *Sahu*, 11 W. R. C. R 19) ; *Collector of Hoogli* v. *Taraknath Mukhopadhyaya*, 7 B. L. R, 449

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(iii) If the judicial officer has acted beyond the limits of his jurisdiction, the protection is qualified by the proviso that the judicial officer, at the time of doing the act or ordering it to be done, believed himself in good faith to have jurisdiction in the matter (*a*).

ART. 9.—*General Immunity of Executive Officers.*

(1) An executive officer, such as a sheriff or gaoler or constable acting on a warrant valid on the face of it and issued by a person **who has jurisdiction,** is absolutely protected for anything he does in pursuance of the warrant (*b*).

(2) But a warrant or order of a court which has **no jurisdiction** in the matter, is no protection (*c*), except in the case of constables, who are protected by statute for arresting under a warrant of a justice, notwithstanding any defect of jurisdiction (*d*).

(1) When a governor of a prison, in obedience to a warrant of commitment which directed that the plaintiff should be imprisoned in a certain gaol for seven days, detained the prisoner from August 25th (the day following that of his arrest) until August 31st, it was held that, as he had acted in obedience to a warrant issued by a court which

A. C.; 16 W. R. 63; *Mrs. Fox* v. *Secretary of State for India in Council*, 59 P. W. R. 1908; *Moti Lal Ghose* v. *Secretary of State*, 9 C. W. N. 495; 1 C. L. J. 355.

(*a*) *Calder* v. *Halket*, 2 M. I. A. 293; *Seshaiyangar* v. *Raghunatha Rao*, 5 M. H. C. R. 345; *Raghunatha Rao* v. *Nathamuni Thathamayangar*, 6 M. H. C. R. 423; *Teyen* v. *Ram Lal*, 12 All 115; *Mahalinga Iyer* v. *Rajani Iyer*, 10 M. L. J. 232; *Madho Prasad* v. *Munshi Ali Hussain*, 9 I. C. 535. Negligence and carelessness in the exercise of duties and wilful abuse of authority will speak against a plea of good faith, *Ammiappa* v. *Mahomed*, 2 M. H. C. R. 443; *Prahlad* v. *Watt*, 10 B. H. C R. 346; *Vithoba* v. *Corfield* 3 B. H. C. R. App. 1; *Vinayak* v. *Bai Itcha*, 3 B. H. C. R. (A. C. J.) 46.

(*b*) *Henderson* v. *Preston*, 21 Q. B. D. 362 (C. A.); *Olliet* v. *Bessey*, T. Jones Rep. 214.

(*c*) *Clark* v. *Woods*, 2 Ex. 395; *Wingate* v. *Waite*, 6 M. & W. 739.

(*d*) See Art. 120.

had jurisdiction, no action for false imprisonment lay against him, whether the sentence properly ran from the day of the arrest (August 24th), or from the day when he was lodged in prison (August 25th) (*a*).

So, too, a sheriff is absolutely protected if under a writ of *fi. fa.* he seizes the goods of the judgment debtor. But the writ is no protection to him if he seizes the goods of some other person, for the writ does not authorise him to do that.

(2) Police officers in India are protected in the performance of their executive duties by express legislative enactments (*b*). If for any act done in the discharge of their duties, they are sought to be made liable, a dishonest intent to injure the plaintiff must be proved (*c*). Where a statute authorises the doing of an act which is prima facie a wrong to an individual, and executive officers are invested with powers of a special and drastic nature, the doer must comply strictly with the conditions imposed by the statute if he desires to rely on it as a justification for his act So where a magistrate failed to record his reasons before issuing a search warrant under the Arms Act (IX of 1878), it was held that consequently he was not protected from the consequences of his action (*d*).

Art. 10—*Authorisation by Statute.*

(1) If the legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful and no action will lie for any damage resulting from doing it, if it be done *without negligence.*

(2) An action does lie for doing that which the legislature has authorised, *if it be done negligently (e).*

(*a*) *Henderson* v. *Preston*, 21 Q. B. D. 362.
(*b*) Act V. of 1861, s. 43; Mad. Act XXIV of 1859; Bom Act IV. of 1890, s. 80; Bom. Act IV. of 1902, s. 140; Punj. Act I of 1914, s. 57.
(*c*) *Narasinha* v. *Imam*, 5 Bom. L. R. 667; *Assan Alliar* v. *Masilumam* [1918] M. W. N. 452.
(*d*) *Clarke* v. *Brojendra Kishore Roy*, 36 Cal. 433.
(*e*) *Per* Lord Blackburn: *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455; *Hammersmith Rail Co.* v. *Brand*,

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(3) If the legislature merely permits a thing to be done if it can be done without causing injury, an action lies if it is done in such a manner as to cause injury (*a*).

Explanation. When the legislature expressly empowers a railway company to make a railway on a particular site and to run trains upon it, no action lies against the company for any nuisance caused by reason of the making of the railway on that site and the running of trains without negligence. Acts of Parliament giving such powers usually contain provisions for compensating persons who suffer by reason of their lands being taken or injuriously affected by the exercise of the statutory powers, but *no action lies*, for what the legislature has expressly authorised cannot be wrongful.

There is, however, an implied obligation not to be negligent in carrying out statutory powers and duties, and for breach of this obligation an action lies.

By many Acts of Parliament and the Indian Legislature local authorities and other bodies are given general powers to execute works, such as making sewerage works for their district, erecting hospitals for infectious diseases, and the like. These things may obviously be nuisances if done or made in unsuitable places, but are not necessarily nuisances. Whether an Act is merely permissive, or is one which expressly authorises the doing of a thing, whether it be a nuisance or not, is a question of construction: but generally when the thing to be done **must necessarily** cause injury to some one, the Act will be construed as authorising the doing of it in any case: if the thing to be done **will not necessarily** cause injury, but will only do so if done in certain places or in a certain way, the Act will be construed as permissive only so long as the powers conferred by statute are not exceeded; the courts will not interfere with a bona fide exercise of discretion (*b*); but where such powers

L. R. 4 H. L. 171; for a recent example of misfeasance, see *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K. B. 195.

(*a*) *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193; *Charing Cross etc. Electricity Supply Co.* v. *London Hydraulic Power* Co., [1914] 3 K. B. 772.

(*b*) *Bhairab Chandra Banerji* v. *Makgill*, 17 W. R. 215; *Municipal Commissioners of Madras* v. *Parthasaradi*, 11 Mad. 341; *Moti Lal Basu* v. *Howrah Municipality*, 23 W. R. 222; *Ollivant* v. *Rahimtulla Nur Mahomed*, 12 Bom. 474; *Moran* v. *Chairman of Motihari Municipality*, 17 Cal. 329.

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are exceeded or exercised in a capricious or oppressive manner, an action is maintainable (*a*). When the legislature authorises an interference with private property, such authority ought to be exercised strictly and exclusively for the purposes and objects for which it was given, and unless it can be shown that interference is necessary for the furtherance of those objects, it will not be permitted (*b*). An enactment such as a Municipal Act, which trenches on the private rights of individuals, must be carefully construed without either unwarrantable severity on the one hand or unjustifiable lenity on the other (*c*); and when the primary sense of the language does not justify a construction in favour of an interference with private rights, the court cannot attempt to strain the interpretation (*d*). Where the protection of a statute is invoked, a nominal compliance with its provisions is not sufficient, but the procedure laid down in it must have been strictly followed and the forms prescribed by it rigidly complied with (*e*). Where there is a deliberate contravention of the statutory requirements, such conduct has no relation to the "execution of the Act" and cannot command statutory protection (*f*). In the absence of express authorisation statutory powers will not enable persons to cause or continue a nuisance (*g*), and if a breach of statutory

(*a*) *Brindavan Chandra Rai* v. *Chairman of the Municipal Commissioners of Serampore*, 19 W. R. 309; *Sundar Lal* v. *Baillie*, 24 W. R. 287; *Hanumayya* v. *Roupell*, 8 Mad. 64; *Kalidas* v. *Municipality of Dhandhuka*, 6 Bom. 686; *Nagar Valad Narsi* v. *Municipality of Dhandhuka*, 12 Bom. 490; *Gaekwar Sarcar of Baroda* v. *Gandhi Kachrabhai*, 27 Bom 344; 30 I. A. 60; *Biddulph* v. *St. George's Vestry*, 33 L. J. Ch. 417; *Gopal Sahai* v. *Bell*, 13 P. R. 1909; 31 P. L. R. 1909; 1 I. C 431; *Duke of Bedford* v. *Dawson*, 20 L. R. Eq. Ca. 358.

(*b*) *Ollivant* v. *Rahimtulla Nur Mahomed*, *supra*.

(*c*) *Ramdularay* v. *Chhindware Municipality*, 6 N. L. R. 53.

(*d*) *Queen-Empress* v. *Harilal*, 14 Bom. 180.

(*e*) *Chabildas Lallubhai* v. *Municipal Commissioners of Bombay*, 8 B. H. C. R. 85; *Sinclair* v. *Broughton*, *supra*; *Ashburner* v. *Keshab Valad Tuku Patil*, 4 B. H. C. R. (A. C. J.) 150; *Luchmeswar Singh* v. *Chairman of Durbhanga Municipality*, 18 Cal. 99; 17 I. A. 90; *Rameswar Singh* v. *Secretary of State*, 34 Cal. 470; *Clarke* v. *Brojendra Kishore Roy*, *supra*; *British India Steam Navigation Co.* v. *Secretary of State for India in Council*, 38 Cal. 230.

(*f*) *Ranchordas Moorarji* v. *Municipal Commissioners of Bombay*, 25 Bom. 387.

(*g*) *Rajmohun Basu and Another* v. *East India Rail. Co.*, 10 B. L. R, 241 [P. C.]; *Jafir Sahib* v. *Kadir Rahiman*, 12 Bom. 634.

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Illustrations. The running of the trains upon a railway constructed under statutory powers, caused noise, vibration, and smoke, which depreciated the value of the plaintiff's property. It was held that as the Act had authorised the running of the trains, and as the damage complained of was a necessary result, no action would lie at common law (*b*). "It cannot now be doubted," says Lord HALSBURY (*c*), "that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law." A railway company authorised by statute to use locomotives on their line set fire to the plaintiff's plantation by sparks emitted from a locomotive. They had used every precaution at that time known to prevent sparks, and had been guilty of no negligence, so they were protected by their statutory authority from liability (*d*). If they had not had express powers to run locomotives they would have been liable at common law, even though there was no negligence in the use of the locomotive (*e*). But in a later case where sparks set fire to dry clippings negligently left by the railway company on an embankment, and the fire spread thence on to the plaintiff's land and set fire to his crops, it was held that the company was liable, by reason of negligence (*f*).

When a railway company allowed the rain water to discharge itself on the plaintiff's land the railway company was thought not to have exercised the powers conferred by the Indian Railway Act, and was held liable for negligence (*g*). When a municipality excavated a trench and

(*a*) *Narayen Jetha* v. *Municipal Commissioners and the Municipal Corporation of Bombay*, 16 Bom. 254 ; *Corporation of the Town of Calcutta* v. *Anderson*, 10 Cal 445.

(*b*) *Hammersmith, etc. Rail Co.* v. *Grand*, L. R. 4 H. L. 171.

(*c*) *London and Brighton Rail. Co.* v. *Truman*, 11 App. Cas. 45, at p. 50.

(*d*) *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679 ; *Halford* v. *East Indian Rail. Co.* 14 B. L. R. 1.

(*e*) *Jones* v. *Festing Rail Co.*, L. R. 3 Q. B. 733.

(*f*) *Smith* v. *London and South Western Rail. Co*, L. R. 6 C. P. 14. See *also The City of Montreal* v. *Watt*, 32 M. L. T. 36 P. C.

(*g*) *Gaekwar Sarcar of Baroda* v. *Gandhi Kachrabhai*, 2 Bom. L. R. 357 ; on appeal, 5 Bom. L. R. 405.

kept it open for a considerable time, so that heavy damage was caused to the plaintiff's house on account of subsidence, the municipality was held liable for negligence (*a*). When one of the roads in Calcutta was allowed to be opened for laying a pipe for carrying surplus water from a tank, and a contractor was employed for it by Government, the necessary licence for breaking open the road being granted by the corporation, but the road being left unfenced and insufficiently lighted at night, the plaintiff was injured while driving along after dark, the corporation were held liable, though the necessary permission to open the road was granted to another person (*b*). When a manhole was opened for the purpose of inserting a flushing door in a sewer and the plaintiff's daughter fell into it and died, it was held that the Municipal Act imposed on the commissioner the statutory duty of having "all places, where the street is opened fenced and guarded," and his default in taking this precaution made him liable in damages for the consequences of his negligence (*c*).

The Metropolitan Asylum District Board were authorised to purchase land and erect buildings to be used as hospitals. But the Act did not imperatively order these things to be done. The Board erected a small-pox hospital, which was, in point of fact, a nuisance to owners of neighbouring lands. On these facts it was held that the Board could not set up the statute as a defence (*d*). The Act was construed as meaning that a small-pox hospital might be built and maintained **if it could be done without creating a nuisance**, whereas the Railway Acts are construed to authorise the construction of the railway, whether a nuisance is created or not.

When the defendant caused nuisance to the plaintiff by building a privy within a small distance of the plaintiff's house, and pleaded that it was so built under the orders of the municipality under s. 36 of Act VI of 1873, it was held that the terms of the section were not imperative, but only

(*a*) *Vithaldas* v. *Municipal Commissioners of Bombay*, 4 Bom. L. R. 914.

(*b*) *Corporation of the town of Calcutta* v. *Anderson, supra.*

(*c*) *Narayen Jetha* v. *Municipal Commissioners and the Municipal Corporation of Bombay*, 16 Bom. 254.

(*d*) *Metropolitan Asylum Distict* v. *Hill*, 6 App. Cas. 193.

As to the evidence necessary to sustain a *quia timet* action for an injunction to prohibit a proposed small-pox hospital, see *Att.-Gen.* v. *Manchester Corporation*, [1893] 2 Ch. 87.

Art. 10. permissive, that the municipality had no authority to make such orders in disregard of the plaintiff's rights, and that the plaintiff was entitled to an injunction (*a*). Similarly, when a railway company built workshops so situated as to cause a nuisance to the neighbour, it was held it could not do so (*b*).

ART. 11.—*Volenti non fit injuria.*

A person who consents to damage being done cannot bring an action in respect thereof.

(1) The application of this rule to cases where there is express consent is simple. A man who gives another permission to trespass on his land, or to touch his person, cannot afterwards bring an action for such trespass. Thus "leave and licence" is always a good defence to any action for tort. But of course anything done in excess of the leave and licence may be the subject of an action; as, for instance, if I give a man permission to walk on my land, doing no damage, and he does damage.

Incurring risk.

(2) The rule, however, is more difficult to apply in cases where the person damaged has not definitely consented to the particular act or omission causing the damage, but has voluntarily accepted the risk of damage being done by some act or omission of another. It has been held that if a person trespasses on land in defiance of a warning that there is danger in so doing (in the particular case the danger was from spring guns), he cannot bring an action for damage resulting from that danger (*c*). And the rule has even been extended to apply to cases where a person has accepted the risk of dangers or inconveniences accompanying his employment—such as those arising from the dangerous condition of the place where he works (*d*), or from the obstinacy or unkindness of employers (*e*). This applica-

(*a*) *Sayad Jafir Sahib* v. *Sayad Kadir Rahiman*, 12 Bom. 634.

(*b*) *Raj Mohun Bose* v. *East India Rail. Co.*, 10 B. L. R. 241 [P. C.].

(*c*) *Ilott* v. *Wilkes*, 3 B. & A. 304. See also *Lygo* v. *Newbold*, 9 Ex. 302.

(*d*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685.

(*e*) *Herd* v. *Weardale Coal and Coke Co.*, [1915] A. C. 67; *Burns* v. *Johnston*, [1916] 2 Ir. R. 144, affirmed [1917] 2 Ir. R. 137 [C. A.].

tion of the rule will be better appreciated later, and is fully dealt with in connection with the law of negligence (*a*). **Art. 11.**

(3) And a person is not disentitled to recover merely because he knows of the existence of danger and takes the risk of incurring it. The amount of the danger and the risks, and all the circumstances must be taken into account. So where the defendants made a trench in the only outlet from a mews and left only a narrow passage on which they heaped rubbish, and the defendant led his horse out of the mews over the rubbish, and it fell into the trench and was killed, it was held to be properly left to the jury whether or not the cabman had persisted contrary to express warning in running upon a great and obvious danger. And the jury having found for the plaintiff, he was entitled to judgment (*b*).

(4) Acquiescence, express or implied, in the wrong, takes away the right of action (*c*). For instance, where after a decree for possession of a cotton press, the defendant continued to be in possession and worked the same with the plaintiff's consent, and fire broke out and much damage was caused, it was held that the maxim applied to the case and the defendant was not liable in damages, no negligence having been proved against him (*d*). Again, where the defendant erected a privy on the plaintiff's land and continued to use it to the plaintiff's knowledge for seven years, Acquiescence.

(*a*) See *post* Art. 88.

(*b*) *Clayards* v. *Dethick*, 12 Q. B. 439. See the observations of BRAMWELL, L. J., on this case in *Lax* v. *Darlington Corporation*, 5 Ex. D. 28, 35.

(*c*) *Jamsetji Burjorji Bahadurji* v. *Ebrahim Vydina*, 13 Bom. 183; see also *Madan Gopal Mukherji and Others* v. *Nilmani Banerji and Others*, 11 W. R. 304; *Safru and Another* v. *Fatteh and Others*, 15 W. R. 505; *Bhairo Datta* v. *Lekhrani Koer*, 16 W. R. 123 (which are all cases of direct acquiescence); *Beni Madhab Das* v. *Ram Jai Rokh*, 10 W. R. 316; *Hira Lal Koer* v. *Parmessur Koer and Others*, 15 W. R. 401; *Shibdas Banerji v. Baman Das Mukharji and Others*, 15 W. R. 36c; *Gopi Chand* v. *Liakat Hossein*, 25 W. R. 211; *Nicoll* v. *Tarini Charan Basu*, 23 W. R. 298 (which are cases of indirect acquiescence). See also *Nil Kant Sahai* v. *Jaju Sahu*, 20 W. R. 328; *Beni Madhab Banerji* v. *Jai Krishna Mukherji*, 12 W. R, 495; *Kedarnath Nag* v. *Khettro Pal Shibratna*, 6 Cal. 34; *Naina Misra* v. *Rupriram*, 9 Cal. 609; *Dattatreya Rayajipati* v, *Shridhar Narayanpai*, 17 Bom. 736; *Yeshwadabai and Gopikabai* v. *Ramachandra Tukaram*, 18 Bom. 66; but see *contra*, *Rani Rama* v. *Jan Mahomed*, 11 W. R. 574; *Krishna Kishore Neogi* v. *Mir Mahomed Ali*, 3 C. W. N. 255.

(*d*) *Jamsetii Burjorji Bahadurji* v. *Ebrahim Vydina*, *supra*,

Art. 11. the court presumed the plaintiff's consent to its erection and refused to allow a suit for its demolition (*a*).

ART. 12.—*To what Extent Civil Remedy interfered with where the unauthorised Act or Omission constitutes a Felony.*

(1) Where any unauthorised act or omission is, or gives rise to consequences which make it, a **felony**, and it also violates a private right, or causes private and peculiar damage to an individual, the latter has a good cause of action.

(2) But (*semble*) the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing, or endeavouring to bring, the felon to justice (*b*).

(3) Where the offender has been brought to justice at the instance of some third person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or a reasonable excuse is shown for his not having been prosecuted, the action will not be stayed (*c*).

(4) In India, an injured person can maintain an action for damages for a wrongful act, even though it amounts to an offence, without in the first instance instituting criminal proceedings against the offender (*d*).

(*a*) *Mai Chaudhurani and Others* v. *Kumudini Kant Banerji and Others*, 17 W. R. 466.

(*b*) *Smith* v. *Selwyn*, [1914] 3 K. B 98.

(*c*) *Carlisle* v. *Orr*, [1918] 2 I. R. 442 ; *Coonamull* v. *Sarno Rawr*, 2 Ind. Jur. (N. S.) 187.

(*d*) *Rupa Bewa* v. *Ram Kumar Sandyal*, 2 Hay. 13 ; *Shama Charan Basu* v. *Bola Nath Datta*, 6 W. R. C. R. 9 ; *Srinath Mukherji* v. *Kamal Karmokar*, 16 W. R. 83 ; *Chaitanno Paramanik* v. *Zemiruddin*, 18 W. R. 27 ; *Virama* v. *Nagayya*, 3 Mad. 6 ; *Abdul Kadir* v. *Mahamad Mera*, 4 Mad. 410 ; *Adamson* v. *Arumugam* 9 Mad.

N..B—Remember the rule does not apply—

1. *To misdemeanors.*

2. *Where there is no duty on the part of the plaintiff to prosecute*, as where he is not the person injured by the felony (*a*).

3. *Where the felony was not committed by the defendant*, but by some third person (*b*).

Death caused by felony.

It is expressly provided by the Fatal Accidents Acts (see *post*, Article 33), that actions for damages brought in respect of the death of any person under those Acts shall be maintainable "although the death shall have been caused under such circumstances as amount in law to felony."

Illustrations.

(1) Where, in an action for seduction of the plaintiff's daughter, a paragraph of the claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion ; it was held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute (*c*).

(2) So, where A. has stolen goods, and B. has innocently bought them from A., the owner may bring an action of trover against B., although no steps have been taken to bring A. to justice, for B. is not guilty of felony (*d*).

(3) Where in a suit for the recovery of certain fees unlawfully collected by the defendant's agent (which act was an offence under s. 165 of the Local Boards Act), the defendant pleaded the bar of the English rule of "the merger of trespass in felony," it was held that the defendant was not guilty of the alleged offence and consequently the English rule could not apply (*e*).

463 ; *Keshabnath Bhattacharya* v. *Maniruddin Sarcar*, 13 C. W. N. 501 ; 4 I. C. 523. See C. P. Code (Act V of 1908), s. 11.

(*a*) *Appleby* v. *Franklin*, 17 Q. B. D, 93.

(*b*) *White* v. *Spettigue*, 13 M. & W. 603; *Taluk Board of Kundapur* v. *Laxmi Narayana*, 31 Mad. 54.

(*c*) *Appleby* v. *Fanklin*, 17 Q B. D. 93 ; and see also *Osborn* v. *Gillett*, L. R. 8 Ex. 88.

(*d*) *White* v. *Spettigue*, 13 M & W. 603.

(*e*) *Taluk Board of Kundapur* v. *Laxmi Narayana*, *supra*.

CHAPTER II.

BREACH OF STATUTORY DUTIES.

ART. 13.—*Breach of Duty created for Benefit of Individuals.*

(1) When a statute creates a new duty **for the benefit of an individual or a class,** and does not provide any special remedy, an action for damages lies for breach of the duty (*a*).

(2) If the statute provides a special remedy, the party injured cannot bring an action for damages (*b*), but he **may have an injunction** unless the statute expressly excludes that remedy (*c*).

(*a*) *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242; *Whittaker* v. *L. C. C.* [1915] 2 K. B. 676; *Ponnusawmi Tevar* v. *Collector of Madura*, 3 M. H. C. R. 35 (following *Ferguson* v. *Kinnoul*, 9 Cl. & Fin. 251: "where a statute imposes a duty, it without express words gives an action for the failing to perform the duty and for wrongfully performing it"); *Corporation of the Town of Calcutta* v. *Anderson*, *supra*: *Bromley* v. *G. I. P. Railway*, 24 Bom. 1; *Dullabhji* v. *G. I. P. Railway*, 34 Bom. 427.

(*b*) *Ram Chand Bhadra and Others* v. *Collector of Jessore and Others*, 3 W. R. 131; *Minto* v. *Kali Charan Das*, 8 W. R. 327 (where compensation for land acquired for public purposes was held to be claimable under the Land Acquisition Act not by separate suit for damages); *Collector of Patna* v. *Ramnath Tagore and Others*, 7 W. R. 191 (where claims under Bengal Regulation VI of 1819 were held to be cognisable only in the manner provided by it and not enforceable by separate suit; following *Stevens* v. *Peacocke*, 11 Q. B. 731, and *Doe* d. *the Bishop of Rochester* v. *Bridges*, 1 B. & A, 847); *Ramchandra* v. *Secretary of State*, 12 Mad. 105; *Subramanya Asari* v. *Secretary of State*, 17 M. L. J. 557 (where the judgment of a forest officer was held to be conclusive under the Forest Act; but see *Satrughan Das Kumar* v. *Hakna Santal* 16 Cal. 159 (where it was held that a suit for compensation for wrongful seizure of cattle, would lie in a civil court, the provisions of Act I of 1871 being no bar to such a suit). See also the Workmen's Compensation Acts (English and Indian), *post*.

(*c*) *Stevens* v. *Chown*, *Stevens* v. *Clark*, [1901] 1 Ch. 894. *Fraser* v. *Fear*, [1912] W. N. 227.

Art. 13.

Explanation.

Under many Acts of Parliament and of the Indian Legislature, local authorities and other public bodies have imposed on them duties for the benefit of the public generally, and a breach of the duty, though it may affect an individual specially, is liable to affect the public at large, or all the persons in a district. Such duties are those which are imposed on sanitary authorities to provide proper systems of sewers, and on gas and water companies to provide gas and water sufficient in quantity and quality. If an individual suffers by breach of these duties, he cannot generally resort to an action, but must proceed by *mandamus*, indictment, or such other remedy as may be available.

It is different, however, where the duty is imposed for the benefit of an individual or a limited class of persons ; in such cases a breach of the duty is a wrong to the individual or to each member of the class for whose benefit the duty is created and a breach of that duty is a tort for which an action for damages will lie, unless the legislature has provided some other remedy, such as a penalty. If a special remedy is provided, that impliedly excludes the remedy by action for damages. But it does not even impliedly exclude the remedy by injunction. Instead of taking the special remedy provided by the statute, the person injured may claim an injunction to restrain threatened breaches of the duty, unless that remedy is expressly excluded by the statute.

In every case, however, it is a question of construction of the statute by which the duty is created. A statute *may* give a remedy by action for breach of a public duty, or may create a private duty and yet say that there shall be no remedy for its breach.

Illustrations.

(1) Under the British Columbia Crown Procedure Act, it is the duty of the provincial secretary to submit to the lieutenant-governor a Petition of Right left with him for that purpose. His definite refusal to do so gave the petitioner a cause of action for damages (*a*).

(2) If an employer is guilty of a breach of a provision in the Factory Acts, by which he is required to fence dangerous machinery, a workman who is injured in consequence thereof, has a cause of action against the employer for such breach (*b*).

(*a*) *Fulton* v. *Norton*, [1908] A. C. 451 [P. C.].

(*b*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402. [C. A.].

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(3) Where the door of a railway carriage was left open, it amounted to negligence on the part of the company, for the consequences of which they were liable to the passengers (*a*).

ART. 14.—*Breach of Duty created for Benefit of Public.*

When a statute creates a duty **for the benefit of the public,** the possibility or otherwise of a private right of action for the breach of such duty must depend on the scope and language of the statute taken as a whole (*b*), and the provision of a specific remedy for the breach of duties created by the Act is generally held to exclude other remedies (*c*) and the injury in respect of which action is brought must be of the same kind as that which the statute was intended to prevent (*d*).

Illustrations.

A sanitary authority in London failed to perform the duty imposed upon them by s. 29 of the Public Health (London Act, 1891, of removing street refuse (including snow) from the streets. The plaintiff suffered injuries by a fall caused by snow which the sanitary authority had neglected to remove. It was held that he had no cause of action (*e*).

In an action by the owners of property in Glasgow for damages in respect of the flooding of their cellars with the sewege owing to regurgitation of one of the defender's main sewers due to heavy rainfall, it was held that the defenders were under a statutory obligation, under the Glasgow Police

(*a*) *Bromley* v. *G. I. P. Railway* 24 Bom. 1; *Dullabhji* v *G. I. P. Railway* 34 Bom. 427.

(*b*) *Dawson* v. *Bingley U. D. C.*, [1911] 2 K. B. 149.

(*c*) *Passmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387; Cf. *Heath's Garage Ld.* v. *Hodges*, [1916] 2 K. B. 370.

(*d*) *Goris* v. *Scott*, L. R. 9 Ex. 125.

(*e*) *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64.

Act, 1866, to provide a suitable and efficient drainage system and were liable as for default for the resulting drainage (*a*). Art. 14.

In *Secretary of State for India in Council* v. *Muthuveerama Reddi* (*b*), it was held that a person bound by reason of his tenure to keep a tank in repair was not liable to an action by individuals injured by his failure to do so. "Because the Zamindars are under an obligation to preserve and repair these tanks as a part of the public duty undertaken by the Government, they cannot be held liable for damage caused by the accidental destruction of one of those tanks." The Zamindar's position is further likened to that of a person or corporation on whom statutory powers are conferred and statutory duties imposed.

ART. 15.—*Highway Authorities not Liable for Nonfeasance.*

A highway authority is not liable for damages resulting from mere nonfeasance, *i.e.*, for mere neglect to perform its statutory duty of repairing the highway: but is liable for damage resulting from misfeasance, *i.e.*, for doing something which creates a nuisance in the highway (*c*).

Explanation.

Before the present highway authorities were created by Act of Parliament, the rule was established that a surveyor of highways was not liable for not repairing a highway, the proper remedy being indictment of the inhabitants (*d*). And many recent cases have shown that the same rule is applied to the statutory bodies to whom the duty of repairing highways has been transferred by statute, unless there is anything in the statute to show an intention

(*a*) St. *George Co-operative Society* v. *Glasgow Corpn.*, 58 Sc. L. R. 568. See also *Boynton* v. *Ancholme Drainage and Navigation Commissioners*, 90 L. J. K. B. 75.

(*b*) 34 Mad. 82.

(*c*) *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Papworth* v. *Battersea Council*, [1914] 2 W. B. 89; *Municipal Council of Vizagapatam* v. *William Foster*, 41 Mad. 538.

(*d*) *Russell* v. *Men of Devon*, 2 T. R. 667.

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Art. 15.

to make them liable for nonfeasance (*a*). The rule applies also to bridges which are highways (*b*), but does not apply to drainage works carried out by local bodies for their convenience, which they are bound to maintain in a proper state of repair so as not to be a nuisance to the neighbouring owners (*c*).

Misfeasance.

No action can be brought against a highway authority for damage which is a necessary consequence of the due and careful exercise of the power to tar the surface of the road with a view to mitigating nuisance from dust, but although it may in certain circumstances be a necessary result of such tarring, that the road water becomes at times dangerously charged with tar acids, it is the duty of the highway authority to prevent water so charged from doing damage after it leaves the road *i.e.* by destroying watercress in beds adjoining the highway (*d*). When a highway authority creates an artificial work in a highway, they will be liable if that work is a nuisance and causes damage to an individual, for the creation of a nuisance is misfeasance. And they may also be liable if by their negligence they allow it to get out of repair so as to become a nuisance, for that is not mere non-repair of the highway. They actively cause a nuisance **by putting the thing there,** if the thing gets out of repair so as to be a nuisance (*e*).

Highway and sanitary authority.

Sometimes the same local body is both highway authority and sanitary authority, and in their capacity of sanitary authority they may put in the highway a manhole or grating for sewers. If this thing gets out of repair by reason of their *negligence* (but not otherwise), they are liable (*f*). But if it becomes a nuisance by reason of the

(*a*) *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524 [P. C.]; *Gibraltar Sanitary Commissioners* v. *Orfila*, 15 App. Cas. 400 [P. C.] *Sydney Municipal Council* v. *Bourke*, [1895] A. C. 433 : *Achratlal* v. *Ahmedabad Municipality*, 28 Bom 340.

(*b*) *Russell* v. *Men of Devon*, *supra*; *M'Kinnon* v. *Penson*, 8 Ex. 319; *Davis* v. *Bromley Corporation*, [1908] 1 K. B. 170.

(*c*) *Dholka Town Municipality* v. *Desaibhai Kalidas*, 38 Bom. 116.

(*d*) *Dell* v. *Chesham Urban Council*, [1921] 3 K. B. 427.

(*e*) *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256 [P. C.]; *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590; *The Corporation of the Town of Calcutta* v. *Anderson*, 10 Cal. 445; *Narayan* v. *The Municipal Commissioner and Corporation of Bombay*, 16 Bom. 254; *Rajendralal Manicklal* v. *The Surat City Municipality*, 33 Bom. 393.

(*f*) See *ante*, Art. 11.

surface of the roadway getting worn down round it, whilst the thing itself is not out of repair, they are not liable. Not as highway authority, for their only breach of duty is not repairing: and not as sanitary authority, for the thing they have put there is not out of repair, and they have been guilty of no negligence (*a*).

Illustrations.

(1) A highway authority removed a fence which their predecessors had erected to protect the public from a dangerous ditch. A man driving along the road drove into the ditch, and was drowned. Removing the fence was misfeasance, and the highway authority was liable (*b*).

(2) An urban authority lawfully made a manhole in the street. The cover was properly made and in good order, but the surface of the road was allowed to wear down so that the cover projected above the surface. The plaintiff's horse stumbled over this, and was injured. The only breach of duty was not repairing the surface of the road, and this was nonfeasance, for which the council was not liable (*c*).

(3) By the negligence of a person employed by the defendants, the highway authority of Canterbury, a heap of stones was left by the side of a road without a light. The plaintiff, driving by in the dark, was upset by it and injured. The negligence consisted in putting the heap of stones by the roadside, and this was misfeasance for which the defendants were liable (*d*).

(4) A local authority was under a statutory obligation to light the streets in its area. The nearest light to a dangerous arch was 70 feet away. A driver of a cart was killed in attempting to pass under the arch. The Court held that the place was inadequately lighted and the authority liable in damages to the widow on the ground that it has done negligently an act it was authorised by statute to do (*e*).

(*a*) *Thompson* v. *Brighton Corporation*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q. B. 332.

(*b*) *Whyler* v. *Bingham Rural District Council*, [1901] 1 Q. B. 45; *Parkinson* v. *West Riding of Yorkshire County Council*, 66 Sol. Jo. 488.

(*c*) *Thompson* v. *Brighton Corporation*, [1894] 1 Q. B. 45.

(*d*) *Foreman* v. *Canterbury Corporation*, L. R. 6 Q. B. 214.

(*e*) *Carpenter* v. *Finsbury Borough Council*, [1920] 2 K. B. 195 at p. 199, following *Geddis* v. *Bann Reservoir Proprietors*, [1878] App. Cas. 420.

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(5) Where the plaintiff brought a suit against the Ahmedabad Municipality to recover damages sustained by him for injuries caused to his horse and carriage in consequence of the neglect of the municipality to repair the road, it was held that as the default leading to the damage was a mere nonfeasance, the suit must fail, for the statute did not impose upon the municipality a duty towards the plaintiff which they negligently failed to perform (*a*).

(6) But where the carrying capacity of a municipal ditch was greatly reduced by the gradual accumulation of silt and rubbish in its bed, and the municipality did nothing to maintain it in proper order, so that the water unable to discharge itself burst into the plaintiff's garden and caused damage, it was held that the municipality were guilty of a clear act of misfeasance, for which they were liable in damages to the plaintiff (*b*).

(*a*) *Achratlal* v. *Ahmedabad Municipality*, 28 Bom. 340.

(*b*) *Rajendralal Manicklal* v. *Surat City Municipality*, 33 Bom. 393.

CHAPTER III.

RELATION OF CONTRACT AND TORT.

ART. 16.—*Distinction between Actions for Tort and for Breach of Contract.*

(1) If the cause of complaint is for breach of a contractual duty (that is to say, is for an act or omission which would not give rise to any cause of action without proof of a contract), the action is one of contract.

(2) But if the relation of the plaintiff and the defendant be such that a duty arises from the relationship, irrespective of contract, for a breach of that duty the remedy is an action of tort (*a*).

Comment.

Formerly a plaintiff had to be careful to frame his action either in tort or in contract, and the rule then was that if the act or omission complained of was both a breach of duty arising apart from contract, and a breach of contract, the plaintiff might sue in contract or tort (*b*). But now the courts do not regard the form of pleading so much as the real nature of the action. The distinction between tort and contract is chiefly of importance upon the question of the amount of costs recoverable (*c*). The rule is that where the wrong is in substance tort, the plaintiff cannot merely by suing in contract entitle himself to a larger measure of damages (*d*).

(*a*) See *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944 [C. A.] *per* A. L. SMITH, L.J., at p. 947; *Mothu Rangaya Chetty* v. *Secretary of State for India in Council*, 15 M. L. J. 226; *Sri Rajah Bommadeva* v. *Putnam*, 8 M. L. J. 185.

(*b*) *Brown* v. *Boorman*, 11 Cl. & F. 1.

(*c*) See County Courts Act, 1888, s. 116, and County Courts Act, 1903, s. 3.

(*d*) *Chinery* v. *Viall*, 5 H. & N. 295.

Art. 16. Illustrations.

(1) A railway company owes to a passenger, irrespective of any contract, a duty to take care. The taking of a ticket also constitutes a contract to carry. If the servants of the railway company are negligent, whether by acts of omission or by acts of commission, the cause of action is in substance a tort, being a breach of a duty arising irrespective of contract, although in form the action might be framed as a breach of contract (*a*).

(2) A person, who takes in a horse under a contract of agistment, impliedly undertakes not to be negligent in respect of the horse. But as he is a bailee for reward, the same duty to take care arises irrespective of the contract and an action for not taking care is in substance an action of tort for negligence (*b*). So in all cases of actions between bailor and bailee, if the duty arises out of the bailment at common law, a breach of that duty gives rise to an action for tort; but if the duty only arises out of a contract between the parties, and would not apart from such contract arise from the mere relationship of bailor and bailee. a breach of the duty is properly the subject of an action for breach of contract (*c*).

ART. 17.—*Privity not necessary where the Remedy is in Tort.*

When something done in pursuance of a contract between two persons gives rise to a relationship between one of them and a third person, such that the one owes a duty to the third person, irrespective of the contract, the third person cannot sue on the contract because he is not privy to it, but he can sue in tort for breach of the duty arising irrespective of the contract. But the grounds and extent of lia-

(*a*) *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134 [C. A.]; *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944 [C. A.]

(*b*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56 [C. A.].

(*c*) *Ibid.*, at p 59, *per* COLLINS, L. J.

bility under a duty apart from contract are not clearly deducible from the recent cases (*a*). Art. 17.

Illustrations.

(1) A man employs a surgeon to attend his wife or his infant son. By reason of the surgeon's negligence, the patient is injured. There is a contract between the man who calls in the surgeon and the surgeon, but none between the surgeon and the patient. But irrespective of the contract, the surgeon owes a duty to take care by reason of the relationship of surgeon and patient. And for breach of this duty the patient can sue in tort (*b*).

(2) A passenger by train lost his luggage by reason of the negligence of the company's servants. The passenger's fare had been paid by his master. There was accordingly no contract between the passenger and the railway company—nevertheless the company were as bailees bound to take care of the passenger's luggage, and for breach of that duty the passenger could sue in tort (*c*).

(3) Again, where the defendant sold to A. hair-wash, *to be used* by *A.'s wife*, and professed that it was harmless, but in reality it was very deleterious, and injured A 's wife, it was held that she had a good cause of action against the defendant, for the hairdresser owed A.'s wife a duty, irrespective of contract, not to send out for her use a dangerous hair-wash (*d*).

(4) But when no duty, irrespective of contract, can be shown, a person who is injured by another's negligence in carrying out a contract has no cause of action. Thus, in *Le Lievre* v. *Gould* (*e*), mortgagees lent money by instalments to a builder, on the faith of certificates negligently granted by the defendant, who was a surveyor appointed not by the mortgagees, but by the builder's vendor. The certificates were inaccurate, and the mortgagees thereby suffered loss, for which they claimed compensation from the defendant:—*Held*, that as there was no contractual relation between them, the defendant owed no duty to the

(*a*) See Salmond on Torts, 5th edition, pp. 425-435.

(*b*) *Gladwell* v. *Steggall*, 5 Bin. N. C. 733; *Pippin* v. *Sheppard*, 11 Price, 400.

(*c*) *Marshall* v. *York, Newcastle and Berwick Rail. Co.*, 11 C. B. 655, and see *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387 [C. A.].

(*d*) *George* v. *Skivington*, L. R. 5 Ex. 1 (dissented from in *Blacker* v. *Lake and Elliot, Limited*, 106 L T. 533).

(*e*) [1893] 1 Q. B. 491 (C. A.).

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plaintiffs, and the action could not be maintained. It was urged that a certificate carelessly issued was as dangerous as an ill-made gun or a poisonous hair-wash, and that on that ground the defendant was liable; but the court would not admit the analogy. Of course, however, if the certificate had been *fraudulent, i.e.*, issued with intent to deceive the plaintiff, then, independently of any contractual relation, the defendant would have been liable in an action of deceit.

(5) So, too, when A. built a coach for the Postmaster-General, B. horsed it and hired C. to drive it, the coach broke down from a defect in its construction, and C. was consequently injured, it was held that A. **owed no duty to C. apart from contract**, therefore C. could not sue A. in tort. Nor, of course, could C. have sued A. in contract, as C. was no party to the contract between A. and B., and A. was no party to the contract between B. and C. (*a*).

(6) A wholesale druggist sold to a retailer a dangerous drug bearing a false label. The retailer sold it to a doctor who sold it to a patient, and the latter took it on the faith of the label and was thereby injured. Despite the absence of privity the Court held the wholesale druggist liable to the injured party (*b*).

ART. 18.—*Duties gratuitously undertaken.*

When a person gratuitously undertakes to perform any service for another, then although no action will lie for not performing the service (there being no consideration for the promise) yet an action will lie for negligence in the performance of it (*c*).

A duty to take care may arise apart from any contract whatever, and for breach of that duty the remedy is an action of tort.

(*a*) *Winterbottom* v. *Wright*, 10 M. & W. 109, followed in *Earl* v. *Lubbock*, [1905] 1 K. B. 253 [C. A.].

(*b*) *Thomas* v. *Winchester*, 6 New York 397, approved in *Dominion Natural Gas Co.* v. *Collins*, [1909] A. C. 640. See Art. 83 *post*.

(*c*) *Coggs* v. *Bernard*, 1 Sm. L. C. 177; *Moolchand* v. *Robinson*, 1 B. L. R. (O. C. J.) 68; *G. T. Agnew* v. *Indian Carrying Co.*, 2 M. H. C. R. 449.

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Illustrations.

(1) Thus, in *Coggs* v. *Bernard*, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got staved through his gross negligence. Upon these facts it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance.

(2) In *Doorman* v. *Jenkins* (*a*), a keeper of a coffee house gratuitously undertook the custody of money for a customer. It was lost whilst in his care by his negligence. He was held liable in an action for breach of the duty to take care arising from his becoming bailee of the money.

(3) Where the plaintiff was invited by the defendants' servant to ride on an engine, and he did so for his own convenience, and was injured by the negligence of the defendants' servants, the defendants were held liable; as by gratuitously undertaking to carry the plaintiff, the defendants came under a duty to exercise care, and they were liable in an acton of tort for breach of that duty (*b*).

(4) As to chattels loaned gratuitously, the duty of the lender is to disclose any dangerous quality of which he actually knows (*c*).

(*a*) 2 A. & E. 256.

(*b*) *Harris* v. *Perry & Co.*, [1913] 2 K. B. 219 [C. A.]; followed in *Karavias* v. *Callinicos*, [1917] W. N. 323 [C A.].

(*c*) *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

CHAPTER IV.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION TAKES PLACE OUTSIDE THE JURISDICTION OF OUR COURTS.

ART. 19.—*Torts committed Abroad.*

AN action will lie in the English Courts for a tort committed outside England, provided :

(a) It is actionable according to English law and not justifiable according to the law of the country where it was committed (*a*) ; and

(b) It is a tort which is not of a purely local nature, such as a trespass to, or ouster from, land, or a nuisance affecting hereditaments for to such torts the *lex situs* or law of the Country in which the property lies applies and English Courts will not administer this law. A similar rule applies to India (*b*).

Note, that in order to comply with paragraph (a) it is not necessary that the tort should be **actionable** according to the law of the country where the act was committed, provided that it is **not justifiable** by that law ; that is to say, that it is an act in respect of which civil **or criminal** proceedings may be taken in that country.

(*a*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 [C. A.] ; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176 ; *Walpole* v. *Canadian Northern Ry. Co.*, [1923] A. C. 113. As to Admiralty jurisdiction for damages from collision on the high seas or in foreign waters and where both ships were foreign, see *The Invincible*, 2 Gall. 29 and *The Diana*, [1862] Lush. 541.

(*b*) See *Govinda Nair* v. *Atchuta Menon*, 39 Mad. 433.

Art. 19.

Illustrations.

(1) Thus, in the leading case of *Mostyn* v. *Fabrigas* (*a*), it was held that an action lay in England against the governor of Minorca for a false imprisonment committed by him in Minorca, the plaintiff being a native Minorquin.

(2) Some ammunition, which was British goods, was seized on board a British ship by an officer of the British Navy in territorial waters of Muscat. The seizure was justifiable in Muscat under a proclamation of the Sultan of Muscat. It was held that no action lay for the seizure (*b*).

(3) So an action will lie in this country for a libel contained in a pamphlet in the Portuguese language and published in Brazil, even though libel be not actionable in Brazil, provided it be not justifiable in Brazil, *i.e.*, it is enough if it be punishable in Brazil (*c*).

(4) The English courts have no jurisdiction to entertain an action to recover damages for trespass to land situate abroad; injuries to proprietary rights in foreign real estate being outside their jurisdiction. So the courts have recently refused to try a case of trespass to lands in South Africa (*d*).

(*a*) 1 Sm. L. C. 591.

(*b*) *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.

(*c*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231 [C. A.].

(*d*) See *British South Africa Co.* v. *Campanhia de Mocambique*, [1893] A. C. 602, where the earlier cases are examined.

CHAPTER V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 20.—*Who may sue.*

(1) Every person may maintain an action for tort, except an alien enemy, or British subject adhering to the King's enemies (*a*), and a convict (sentenced to death or penal servitude) during his incarceration (*b*).

(2) A married woman may sue alone, and any damages recovered are her separate property (*c*).

(3) A husband cannot sue his wife in tort (*d*).

(4) A wife can sue her husband in tort "for the protection and security of her own separate property"; but cannot sue him otherwise in tort (*d*).

(5) A corporation cannot sue for a tort merely affecting its reputation, such as a libel charging the corporation with corrupt practices (*e*); unless (a) the statement would have been defamatory of an individual and (b) it tends to

(*a*) See *De Wahl* v. *Braune*, 1 H. & N. 178; *Netherlands South African Rail. Co* v. *Fisher*, 18 T. L. R. 116.

(*b*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 30.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; Act III of 1874, s. 7; *Beasley* v. *Roney*, [1891] 1 Q. B. 509; *Harris* v. *Kylash Chunder*, 1 Cal. 285; *Cursetji* v. *Rustomji*, 11 Bom. 348.

(*d*) *Phillips* v. *Barnet*, 1 Q. B. D. 436; *Hulton* v. *Hulton*, [1917] 1 K. B. 813; and 45 & 46 Vict. c. 75, s. 12.

(*e*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

cause actual damage to the corporation with regard to its business or property (*a*). Art. 20.

At common law husband and wife could not sue each other at all, nor could a married woman sue anyone without joining her husband as plaintiff. Now a married woman can sue alone anyone but her husband. She can also sue her husband for the protection and security of her separate property; but no corresponding right is given to him. If a husband claims possession of property from his wife he must proceed by originating summons to have the question determined in a summary manner by a judge (*b*).

Unborn child.

It is doubtful whether an action can be brought for injuries suffered by the plaintiff whilst he was still *en ventre sa mere*. It has been held in Ireland that an action for negligence would not lie in such circumstances (*c*); but it has been held in England that where a man was killed by negligence his child, unborn at the time of the accident, might claim damages under Lord Campbell's Act (*d*).

Aliens in India.

Alien enemies (*e*) residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the courts of British India as if they were subjects of his Majesty (*f*).

Art. 21.—*Who may be sued for a Tort.*

(1) Every individual who commits a tort is liable to be sued, notwithstanding infancy, coverture, or unsoundness of mind; except (i) the sovereign, (ii) foreign sovereigns, and

(*a*) *South Hetton Coal Co.* v. *N. E. News Association*, [1894] 1 Q. B. 133.

(*b*) Married Women's Property Act, 1882, ss. 12, 17.

(*c*) *Walker* v. *Great Northern Rail. Co.*, 28 L. R. Ir. 69.

(*d*) *The George and Richard*, L. R. 3 Ad. & E. 466.

(*e*) As to who are alien enemies, See *Porter* v. *Frendenburg*, [1915] 1 K. B. 857; *Scotland* v. *South African Territories*, 33 T. L. R. 255; *Schaffenius* v. *Goldberg*, [1916] 1 K. B. 284; *Janson* v. *Driefontein Consolidated Mines Ld.*, [1902] App. Cas. 484; *Angelina* v. *Joseph*, 39 All. 377.

(*f*) Section 83, C. P. Code (Act V of 1908).

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(iii) ambassadors of foreign powers (*a*). But foreign sovereigns and ambassadors can waive their privilege (*b*).

(2) A corporation which commits a tort is as liable to be sued as a private individual would be. The test of the liability for the torts of its servants or agents is the fact of authority or ratification by the directing body of the Company (*c*). The doctrine of *ultra vires*, usually based as to a Company's torts on the decision in *Poulton* v. *L. & S. W. Ry. Co.* (*d*) is, it is submitted, only applicable to negative implied authority to do acts *ultra vires* and cannot affect liability for acts expressly authorised.

(3) No action for tort can be brought against a trade union.

Illustrations.

Infants.

(1) Thus, if an infant hires a horse he is liable in an action of negligence for immoderately riding the horse, for, as bailee, he is bound to take care of the horse, and the breach of that duty is a tort (*e*). But he would not be liable in an action of *contract* founded on the hiring (*f*).

(2) An infant, however, cannot be sued in tort if such an action would be only an indirect way of enforcing a contract on which he is not liable. So if goods (not being necessaries) are delivered to him under a contract of sale and he does not pay for them, he cannot be sued for converting them to his own use, for that would be only another way of recovering the price (*g*). Nor, if an infant induces another to contract with him by representing that he is of age, can

(*a*) See *Magdalena Co.* v. *Martin*, 28 L. J. Q. B. 310; and in India, See C. P. Code (Act V of 1908), s. 86

(*b*) *Duke of Brunswick* v. *King of Hanover*, 6 Bea. 1.

(*c*) *The National Bank* v. *Graham*, 100 W. S. 702; *Salt Lake City* v. *Hollister*, 118 W. S. 260.

(*d*) L. R. 2 Q. B. 534.

(*e*) *Burnard* v. *Haggis*, 14 C. B. (N.S.) 45, followed in *Walley* v. *Holt*, 35 L. T. 631.

(*f*) *Jennings* v. *Rundall*, 8 Term Rep. 335.

(*g*) *Per cur.* in *Manby* v. *Scott*, 1 Sid. 129 [Ex. Ch.].

he be sued in an action for deceit, for that would be only another way of recovering damages for breach of the contract (*a*). So where an infant, by fraudulent misrepresentation as to his age, induced plaintiff to advance him money on the security of a mortgage, and a suit was framed on the basis of such fraudulent misrepresentation, the suit was held to be bad as the plaintiff could not be permitted to recover by framing his suit *ex delicto* what he could not recover *ex contractu* (*b*); but in a later case of a similar nature the same court gave a mortgage-decree for the amount, but without interest, and said that where a plea of infancy was set up, it was competent for the plaintiff to put in a replication setting up fraud in answer (*c*).

Lunatics.

(3) There is not much authority upon the liability of *lunatics* for their torts. KELLY, C.B., says lunacy is no defence in an action for a wrong, as libel or assault (*d*). But ESHER, M.R., suggests that his liability in libel depends on "whether he is sane enough to know what he is doing" (*e*). Lord KENYON points out in *Haycroft* v. *Creasy* (*f*), the distinction between answering *civiliter et criminaliter* for acts injurious to others. "In the latter case the maxim applied *actus non facit reum nisi mens sit rea*, but it was otherwise in civil actions where the intent was immaterial if the act done were injurious to another." And no doubt a lunatic is generally liable in tort (*g*).

Colonial governors.

(4) A governor of a colony is not a sovereign. He may be sued for tort in the courts of his own colony or in this country (*h*).

(*a*) See *Johnson* v. *Pie*, 1 Keble, 905, 913; *Bartlett* v. *Wells*, 1 B. & S. 826.

(*b*) *Dhanmull* v. *Ram Chander Ghose*, 24 Cal. 265.

(*c*) *Sarat Chand Mitter* v. *Mohun Bibi*, 25 Cal. 371, (following *Savage* v. *Foster*, 2 Wh. & Tud. L. C., 6th ed., 678, and affirming 2 C. W. N. 18, and doubting 24 Cal. 265); *R. Leslie Ld.* v. *Sheill*, [1914] 3 K. B. 607.

(*d*) *Mordaunt* v. *Mordaunt*, L. R. 2 P. & D. 102, 142.

(*e*) *Emmens* v. *Pottle*, 16 Q. B. D. 354, 356 [C. A.].

(*f*) 2 East, 92, at p. 104.

(*g*) See also *per* ESHER, M.R, in *Hanbury* v. *Hanbury*, 8 T. L. 559 [C. A.] at p. 560.

(*h*) *Fabrigas* v. *Mostyn*, 1 Cowp. 161; *Phillips*, v. *Eyre*, L. R. 6 Q. B. 1; *Musgrave* v. *Pulido*, 5 App. Cas. 102; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

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Corporations.

(5) With regard to corporations, of course actions of tort can of necessity only arise for acts or omissions of their directors or servants, and the difficulty in such cases is the same as arises in other cases of the responsibility of a principal for the acts of his agent, *viz.*, the difficulty of determining whether or not the act or omission complained of was within the scope of the general authority or duty of such servant or director (*a*).

It was long doubtful whether a corporation aggregate could be sued in an action of malicious prosecution. It was thought that a corporation, having no mind, could not act maliciously (*b*). But it is now settled that a corporation may be made liable for malicious prosecution if in instituting the proceedings it is actuated by motives which in an individual would be malice (*c*).

And on the same principle, a corporation may be liable for publishing a libel on a privileged occasion. Though a corporation cannot itself be guilty of actual malice, it is liable if its agent in publishing the libel is actuated by malice (*d*).

Trade unions.

(6) Trade unions registered under the Trade Union Acts, 1871 and 1876, are associations of masters or of workmen empowered to hold property, and with limited powers of suing and being sued in contract. In India they are generally registered under the Societies Registration Act (XXI of 1860).

It was held in the famous Taff Vale Case (*e*), that there was nothing in these Acts to prevent an action for tort being brought against a trade union, and after that decision many such actions were brought until the Trade Disputes Act, 1906 (*f*), was passed. That Act provides (*inter alia*) that an action shall not be entertained by any court (a) against a trade union, or (b) against any members or officials of a trade union (on behalf of themselves and all other members of the union) in respect of any tortious act

(*a*) See Chapter VI.

(*b*) See Lord BRAMWELL'S opinion in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

(*c*) *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392, following *Edwards* v. *Midland Rail. Co.*, 6 Q. B. D. 287.

(*d*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423.

(*e*) *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426.

(*f*) 6 Edw. 7, c 47.

alleged to have been committed by or on behalf of the union. This gives trade unions complete immunity from actions of tort. Art. 21.

ART. 22.—*Joint Tort-feasors.*

(1) Persons who jointly commit a tort may be sued jointly or severally; and if jointly, the damages may be levied from both or either (*a*).

(2) A judgment against one of several joint tort-feasors is a bar to an action against the others, even although the judgment remains unsatisfied (*b*).

(3) A release of one of several joint tort-feasors is a bar to an action against the others (*c*); but a mere covenant not to sue one of them is not (*d*).

(4) If damages are levied upon one only, then (a) where the tort consists of an act or omission, the illegality of which he must be presumed to have known, he will have no right to call upon the others to contribute (*e*). But (b) where the tort consists of an act not obviously unlawful in itself (*e.g.*, trover by a person from whom the same goods are claimed by adverse

(*a*) *Hume* v. *Oldacre*, 1 Stark. 351, *Blair and Sumner* v. *Deakin, Eden and Thwaites* v. *Deakin*, 57 L. T. 522; *Goverdhan* v. *Maruti*, 11 N. L. R. 183; 31 I. C. 872.

(*b*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 [Ex. Ch.]; *Hemendro Kumar Mullik* v. *Rajendra Lal Munshi*, 3 Cal. 353; *Govind* v. *Jijibai*, 36 Bom. 189.

(*c*) *Cocke* v. *Jennor*, Hob. 66; *Makund Singh* v. *Saraswati Bibi*, 25 C. L. J. 245; 51 I. C. 98.

(*d*) *Duck* v. *Mayeu*, [1892] 2 Q. B. 511 [C. A.].

(*e*) *Merryweather* v. *Nixan*, 8 Term Rep. 186. But this does not apply to general average contribution, see Maritime Conventions Act, 1911, s. 3, and *Austin Friars SS. Co., Ltd.* v. *Spillers Bakers, Ltd.*, [1915] 3 K. B. 586.

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claimants), he may claim contribution or indemnity against the party really responsible for the tort; and this right is not confined to cases where he is the agent or servant of the other tort-feasor (*a*).

Ground of liability.

When two or more persons join in committing a tort, each is responsible for the whole of the injury sustained by their common act. To constitute two persons joint tort-feasors, they must act together in furtherance of a common design, or one must aid, counsel or direct the other. If two persons acting quite independently contribute by their separate acts to the same damage, they are not joint tort-feasors. So, too, persons independently repeating the same slander, or independently making a noise or obstruction which is a nuisance, are not joint tort-feasors (*b*).

The liability of wrongdoers in tort is, as a general rule, joint and several. "The principle is that persons who act in concert or combination to commit the wrong which actually results in damage to person or property, must each be held liable for the entire damages, no matter what part one may take, so long as there is concerted action (*c*) . . .

(*a*) *Adamson* v. *Jarvis*, 4 Bing. 66, 72, *Betts* v. *Gibbins*, 2 A. & E. 57.

(*b*) See *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450; *Nilmadhub Mukharji* v. *Dukhiram Kottah and Others*, 15 B. L. R. 161 [O. C.] (where it was held that an action for slander could not be brought jointly against several defendants); but see *Uzirunissa* v. *Mahomed Husain and Others*, 15 B. L. R. 166 n. (where the action was maintained on the basis of the special damage arising from the slanderous words, such special damage constituting the combined action of the defendants).

(*c*) *Ganesh Singh* v. *Ram Raja*, 12 W. R. 38 (P. C.) (where rioters as members of a common assembly plundered a house); *Shama Sankar* v. *Sree Nath*, 12 W. R. 354 (where trespassers had colluded to keep the true owner out of possession of his property); *Jhoonkee Panrey* v. *Ajoodhya*, 19 W. R. 218 (where a tenant in common had been excluded by the joint action of the defendants from his property which had been divided as a spoil amongst them); *Ram Chunder Surmah* v. *Ram Chunder Pal*, 23 W. R. 226 (where intermediate tenure-holders had combined wrongfully to keep an auction purchaser out of possession); *Piaran* v. *Ahmad Ali Khan*, 4 W. R. Misc. 7; *Satyanand Ghosal* v. *Sarup Chandra Das*, 14 W. R. 76; *Harihar Prasad* v. *Bholi Pershad*, 6 C. L J. 383; *Madan Mohan Singh* v. *Ram Dass Chuckerbutty*, 6 C. L. R. 357; *Biresshur Dutt Chaudhury* v. *Baroda Prosad Chaudhury*, 15 C. W. N. 825; 11 I. C. 504; *Abhoy Kumar* v. *Upendra Nath Ghosh*, 18 I. C. 599.

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In cases, however, where there is no combination and where the injury to the plaintiff, though wrongful in the sense that it is an infraction of his legal rights, has been caused in good faith, or in assertion of an imperfect title, the strict rule of joint and several liability cannot justly be enforced" (*a*).

One cause of action.

Against two or more joint tort-feasors there is only **one cause of action,** and if that cause of action is **released** or **merged in a judgment,** no second action can be brought. So where A. and B. jointly converted C.'s piano to their own use, and judgment was recovered in an action against A. only, no further action could be brought against B., although the judgment against A. was unsatisfied. A. or B. might have been sued jointly in the first action, and then C. might have enforced the judgment against either of them (*b*). But a mere covenant not to sue one of the joint tort-feasors does not operate as a release of the others from liability (*c*). Accordingly, where the plaintiff entered into a compromise with some of the defendants and released his claims against them, it was held "that a release of one without any intention to release the other joint tort-feasor, but only as partial satisfaction, discharges the other only *pro tanto*" (*d*).

No suit for contribution does, as a general rule, lie among joint tort-feasors *inter se* (*e*). But the strict application of this rule as enunciated in *Merryweather* v. *Nixon* in India has been doubted (*f*) and the rule has been restricted to those cases where the person seeking redress must be presumed to have known that he was doing an unlawful

(*a*) *Ram Ruttan Kapali* v. *Aswini Kumar Dutt*, 37 Cal. 559; *Fazal Mahomed Mandal and Another* v. *Raj Kumar Debi*, 6 W. R. 113; *Nawab Nazim of Bengal* v. *Raj Kumar Debi*, 6 W. R. 113; *Collector of Bogra* v. *Sham Shunkar Mujumdar and Others*, 6 W. R. 230; *Krishna Mohan Baisak* v. *Kunja Bihari Baisak*, 9 C. L. R. 1 (in all these cases where the legal owner sought for mesne profits from trespassers, the decree imposed a several liability according to the respective wrongs of the defendants).

(*b*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547 [Ex. Ch.].

(*c*) *Duck* v. *Mayeu*, *supra*.

(*d*) *Ram Ruttan Kapali* v. *Aswini Kumar Dutt*, *supra* (following *Snow* v. *Chandler*, 10 N. H. 93 and *Seithen* v. *Philadelphia*, 125 Pa. 397); *Ram Kumar Singh* v. *Shaik Ali Hussain*, 31 All. 173.

(*e*) *Harnath* v. *Hari Singh and Others*, 4 N. W. P. 116.

(*f*) *Nihal Singh* v. *Collector of Bulandsahr*, 38 All. 237; *Bishnu-Charan Roy* v. *Bepin Chandra Roy*, 18 C. W. N. 622, 25 I. C. 729.

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act (*a*), so that where they acted under a bona fide claim of right, and had reason to suppose that they had a right to do what they had done, they might have a right of contribution *inter se* (*b*), and in such case the court should inquire what share each of them took in the transaction, as, according to circumstances, one or more of them might be excused altogether or in part from contributing (*c*).

If, however, a joint decree was passed and the moneys recovered from one of the tort-feasors, it was held that "whatever the rights and liabilities of joint tort-feasors *inter se* may be before such a decree is passed, there is a right of contribution afterwards, the matter having passed *in rem judicatum*, and the court is not entitled to go behind such a decree and consider the merits of the case" (*d*).

Again, where the loss arising from an illegal contract is adjusted, so that the adjustment is equivalent to a payment, the adjustment cannot be distributed (*e*).

Partners.

When a partner in a firm acting in the ordinary course of the business of the firm, or with the authority of his co-partners, commits a tort in regard to any third person, all the partners are jointly liable. Each member of the firm is also severally liable (*f*).

(*a*) *Manja* v. *Kadu Gochen*, 7 Mad. 39; *Gobind Chunder Nandy* v. *Sri Gobind Chowdhry*, 24 Cal. 330; *Sripati Rai* v. *Loharam Rai*, 7 W. R. 384; *Rati Sardar and Others* v. *Saju Paramanik*, 20 W. R. 235; *Supat Singh* v. *Imrit Tewari and Others*, 5 Cal. 720.

(*b*) *Krishna Ram* v. *Rakmini Sewak and Others*, 9 All. 221; *Hari Saran Mitra* v. *Jotindra Mohun Lahiri*, 5 C. W. N. 293; *Frakire* v *Tasadduq*, 19 All. 462; *Bishnucharan Roy* v. *Bepin Chandra Roy*, 18 C. W. N. 622; 25 I. C. 729; *Ras Mutt Ali* v. *Asab Ali*, 38 I. C. 140; *Ram Bilas Singh* v. *Amir Singh*, 1 Pat. L. T. 235; 61 I. C. 425.

(*c*) *Supat Singh* v. *Imrit Tewari and Others*, *supra*.

(*d*) *Ram Prasad* v. *Arja Nand*, 10 A. W. N. 161; *Mahabhir Prasad* v. *Darbhanga Thakur*, 4 Pat. L. J. 486=see also *Golam Hossein* v. *Imam Bux*, 32 P. R. 1866.

(*e*) *Laxmana Ayyan* v. *Rangasami Ayyan*, 17 Mad. 78.

(*f*) See Art 24 *post*.



CHAPTER VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

SECTION I.—LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 23.—*Wife's ante-nuptial and post-nuptial Torts.*

(1) A married woman may be sued alone in respect of her *ante-nuptial* torts. Her husband is also liable to the extent of the property which he received with her ; and he may be sued either jointly with her or alone (*a*).

(2) A married woman may also be sued alone in respect of her *post-nuptial* torts (*b*), but her husband is also liable, and may be joined with her as defendant (*c*).

(3) The liability of a husband for his wife's torts comes to an end by the death of the wife, or by divorce or judicial separation (*d*), or during the operation of a separation order under the Married Women's (Summary Jurisdiction) Act, 1895, s. 6. But a voluntary separation by deed does not affect the husband's liability (*e*).

(*a*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) ss. 13-15, and Act III of 1874. As to ante-nuptial debts of the wife, see *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*b*) *Ibid.*, s. 1.

(*c*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177 ; *Earle* v. *Kingscote*, [1900] 1 Ch. 203.

(*d*) See Matrimonial Causes Act, s. 26.

(*e*) *Utley* v. *Mitre Publishing Co.*, 17 T. L. R. 720.

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Before the Married Women's Property Act, in England (as well as in India,) a wife could not be sued alone for a tort. Her husband was necessarily joined as defendant in an action of tort brought against her, as all her property vested in him during coverture, and there was therefore no means of satisfying a judgment obtained against her alone. Since the passing of the Married Women's Property Act, a married woman is capable of holding separate property, and judgment may be had against her to the extent of her separate property, and to that extent the Act provides that she is liable for, and may be sued alone for, her torts as if she were a *feme sole*. This enactment, however, does not affect the common law liability of a husband for his wife's torts (*a*); and, consequently, a plaintiff can elect whether he will sue the wife alone, or join her husband as co-defendant with her. The present state of the law is clearly defined by the judgment of the Court of Appeal in *Beck* v. *Pierce* (*b*).

If a husband allows his wife to take up service elsewhere, he must not on that account be held liable for his wife's acts of misappropriation (*c*), A fraudulent representation by a wife that she has authority to make a contract on behalf of her husband is not a tort in respect of which the husband can be sued as being liable for his wife's torts; and the fact that no contract was in fact induced by such representation is immaterial (*d*).

Death or divorce.

If the wife dies or the marriage is dissolved (*e*), from that moment the husband's liability ceases, even for torts committed during coverture, and even though an action is pending. Unless judgment has been actually given, his liability is at an end from the moment of her death or the decree absolute.

Separation.

The same rule applies where the parties are judicially separated (*f*). The decree puts an end from the moment when it is pronounced to the husband's liability. But where the parties are living apart under a voluntary separation, a husband's liability for his wife's torts continues (*g*).

(*a*) *Seroka* v. *Kattenburg*, 17 Q. B. D, 177.
(*b*) 23 Q B. D. 316.
(*c*) *Simpson* v. *Bachman*, 13 A. L. J. 55; 27 I. C. 622.
(*d*) *Edwards* v. *Porter*, 39 T. L. R. 124.
(*e*) *Capel* v. *Powell*, 17 C. B. (N. S) 743.
(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26; *Cuenod* v. *Leslie*, [1909] 1 K. B. 880 [C. A.].
(*g*) *Head* v. *Briscoe*, 5 C. & P. 484.

SECTION II.—LIABILITY OF PARTNERS FOR EACH OTHER'S TORTS.

The foundation of the liability of partners for each other's torts is that each partner is the agent of his co-partners in relation to the conduct of the partnership business. The law has now been codified by ss. 10 and 11 of the Partnership Act, 1890, and in India by s. 250 of the Indian Contract Act, 1872.

ART. 24.—*Statutory Rule.*

(1) Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Partnership Act, 1890, s. 10

(2) When the firm is liable, the individual partners are jointly and severally liable.

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(3) Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

Indian Contract Act, 1872, s. 250.

In order to render a firm liable, the tort must be a wrongful act or omission of a partner committed or made either (1) with the authority of his copartners, or (2) in the ordinary course of the firm's business (*a*). If, therefore, it be committed or made without the actual authority of the copartners, and outside the scope of the partner's ostensible authority, the firm will not be liable any more than it would be for a contract entered into under similar circumstances.

Illustrations.

(1) Thus a firm of solicitors would be liable for the professional negligence and unskilfulness of one of the partners (*b*). Similarly, a firm of newspaper proprietors would be liable for a libel inserted by an editor partner.

Negligence.

Libel.

(*a*) *Hamlyn* v. *Houston*, [1903], 1 K. B. 81.

(*b*) *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith and Blyth*, [1891] 1 Ch. 337.

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So, a firm of company promoters would be liable for a fraudulent prospectus issued in the course of business by an individual partner. In all these cases the inquiry is simply whether the wrongful act or omission was done or made in the course of the partner's duty as such, or outside it. But where A. and B. were partners in the business of law agents and conveyancers, and where A., while acting as secretary of a limited company embezzled a considerable amount of the company's money and B. was sued by the company, *inter alia*, for the money so embezzled, it was held that the money embezzled by A. had not been received by the firm in the course of its business, and that the firm had not been gratuitously benefited by the payment of the money into its bank account, and therefore the firm and the remaining partners were not liable (*a*). If a servant acts at the instigation of his master in launching a malicious prosecution, the master will be liable for damages (*b*).

Fraud.

Malicious prosecution

But the mere fact that a partner, in instituting a malicious prosecution against a stranger, described himself as the agent of the partnership, is not sufficient to render the firm or its partners liable in damages to the stranger, in the absence of evidence to show that the firm had authorised or instigated such prosecution (*c*).

Fraudulent guarantees.

(2) There is one sort from which the firm is specially exempted from liability by the Statute of Frauds Amendment Act, 1828 (*d*), by which it is enacted that the firm is not to be liable for false and fraudulent representation as to the character or solvency of any person, unless the representation is in writing **signed by all the partners.** The signature of the firm's name is insufficient even although all the partners are privy to the misrepresentation (*e*).

(*a*) *New Mining and Exploring Syndicate, Limited* v. *Chalmers*, (1912) S. C. 126.

(*b*) *Bishan Singh* v. *Ram Bahal Roy*, 64 I. C. 741.

(*c*) *Ahmedbhai* v. *Framji Edulji*, 28 Bom. 226.

(*d*) 9 Geo. 4, c. 14, s. 6.

(*e*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301 [Ex. Ch.].

SECTION III.—LIABILITY FOR TORTS OF AGENTS AUTHORISED EXPRESSLY OR BY RATIFICATION.

ART. 25.—*Qui facit per alium facit per se.*

A person who expressly authorises another to commit a tort is liable as fully as if he had himself committed the tort. And the agent is also liable. In tort a person cannot excuse himself by saying that he was acting as the agent of another. Agent and principal are equally liable.

A principal is not, however, necessarily answerable for every tort of his agent. If the agent is employed to commit a tort the principal is clearly liable. If the agent is employed to do a thing not in itself wrongful, and in the course of doing the thing for which he is employed he commits a tort, the extent of the principal's liability depends, as we shall see hereafter, partly on whether the agent is a servant or an independent contractor.

ART. 26.—*Ratification of Tort committed by an Agent.*

A tortious act done for another, by a person not assuming to act for himself, but for such other person (*a*), though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and, whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*b*).

(*a*) See *Eastern Construction Co. Ltd.* v. *National Trust Co. Ltd.*, (1914) A. C. 197 at p. 213.

(*b*) *Wilson* v. *Tumman*, 6 Man. & Gr. 236, 242.

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This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*," and is equally applicable to torts and to contracts.

To constitute a binding ratification of acts done without previous authority (1) the acts must have been done for and in the name of the supposed principal, and (2) full knowledge of them, and unequivocal adoption, must be proved; or else the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent, whatever their nature or culpability (*a*).

Illustrations.

The plaintiff's goods were illegally seized under a warrant of distress handed to a bailiff by the defendants The plaintiff wrote to the defendants seeking reparation. The defendants replied that their solicitors would accept process of service. The defendants had given no special instructions to the brokers. It was held in the Court of Appeal that there was ample evidence of ratification by the defendants, and that they were liable for the wrongful seizure made by the bailiff on their behalf (*b*). Similarly, where one of the defendants committed acts of trespass for the benefit of the members of the committee and such acts were afterwards adopted and taken advantage of by them with full knowledge of the facts, it was held that the defendants were liable (*c*). But where an assistant of the defendants forcibly took away the goods to their godowns without satisfying the plaintiffs' lien thereon, and the defendants had no knowledge of the circumstances, it was said that the receipt of the goods did not amount to a ratification (*d*).

(*a*) *Marsh* v. *Joseph*, [1897] 1 Ch. 213 [C. A]; *Wilson* v. *Tumman*, *supra*; *Keighley Maxsted & Co.* v *Durant*, [1901] Ae. C 240; *Barns* v. *St. Mary Islington*, 76 J. P. 11; *Becker* v. *Richold*, 30 T. L. R 142; *Shama Sundari Debi* v. *Dukhu Mandal and Others*. 11 W R. 101.

(*b*) *Carter* v. *St. Mary Abbott's Kensington Vestry*, 64 J. P. 548 [C. A.].

(*c*) *Venkatesa Naicker* v. *Srinivasachariar*, 4 M. H. C. R. 410.

(*d*) *Girish Chandra Das* v. *Gillanders Arbuthnot & Co.*, 2 B. L R. (O. C. J.) 140.

SECTION IV.—LIABILITY FOR TORTS OF SERVANTS.

ART. 27.—*Respondent Superior.*

(1) A servant is a person employed by another and subject to the commands of that other as to the way he shall do his work.

(2) A person who is in the general employment of one man may be the servant of another for a particular purpose, that other having control of him as to the manner in which he carries out his duties in connection with that particular purpose.

(3) A master is liable for the negligence of his servant committed in the course of his employment (*a*).

(4) A master is liable for the wilful tort of his servant committed within the scope and in the course of his employment (*b*), and though the tort amounts also to a crime.

It is submitted that despite the apparent conflict of the decisions as to a master's liability for the wilful tort of his servant, the true test is as stated above in paragraph (4). The cases appear to fall into three groups: (1) Where the servant was not about his master's business at the time of committing the tort. (2) Where he was about his master's business but the tortious act could arise only from doing an act the master had not held him out as competent to do. (3) Where he was about his master's business and the act constituting the tort arose from doing an act the master had held the servant out as competent to do. Into group (1) fall cases like *Storey*

(*a*) *David Bruce* v. *Kyaw Zin*, 45 I C. 822; *The Madras and Southern Mahratta Ry. Co., Ld.* v. *Matti Subba Rao*, 43 Mad. 617; *Raja Dakheswar Prasad Narain Singh* v. *Manna Lal*, 51 I. C. 763. As to the exceptional case of injury done by one servant to another servant working in common employment under a common master, see Art. 92, *post*.

(*b*) *Lloyd* v. *Grace Smith & Co.*, [1912] A. C. 716.

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v. *Ashton*, [1869] L. R. 4 Q. B. 476 and *Beard* v. *L. G. O. Co.*, [1900] 2 Q. B. 530. Into group (2) fall cases like *Cheshire* v. *Bailey*, [1905] 1 K. B. 237; *Houghton* v. *Pilkington*, [1912] 3 K. B. 308; and *Mintz* v. *Silverton*, [1920] 36 T. L. R. 399. Into group (3)—the group of liability—comes *Barwick* v. *English Joint Stock Bank*, (1867) L. R., 2 Ex. 259; *Lloyd* v. *Grace Smith & Co*, [1912] A. C 716; *Irwin* v. *Waterloo Taxi Cab Co., Ltd.*, [1912] 3 K. B. 588.

What constitutes a servant.

The test to be applied to ascertain whether a person doing work for another is or is not his **servant** is to consider whether the master has complete control of him as to the way he does his work. If he has, the person employed is a servant, and the master is liable for the consequences, because he has made himself responsible not only for the act itself, but for the manner of doing it. Thus, the relation of master and servant is in each case a **question of fact**, depending not on the mode of payment for services, or the time for which the services are engaged, or the nature of those services, or on the power of dismissal (though each of those matters may be taken in consideration), but on the extent of control as to the way in which the work is done. A wrong-doer cannot escape liability on the ground that he was a servant acting for his master's benefit and his liability is independent of that of the master for his servant's default (*a*).

Illustrations.

(1) Thus, where an owner of a carriage was supplied by a livery stable-keeper with a driver (who was in his employment as a coachman), and the owner of the carriage was also **owner of the horse and harness**, it was held by RUSSELL, C. J., that in all the circumstances of the case the owner of the carriage had control of the driver as to the manner of driving, and the driver was his servant. The owner of the horse and harness would be the person to give directions as to the way in which the horse should be harnessed and driven, and so had control of the driver as to the way in which he should do his work, and accordingly the owner of the carriage was liable for damage done by the negligence of the driver in driving (*b*).

(2) But where two ladies, owners of a carriage, *hired horses* from a livery stable, and with the horses a driver, whom they put into their livery, but to whom they did not

(*a*) *Daji* v. *Rukhma*, 8 N. L. R. 159; 17 I. C. 378.

(*b*) *Jones* v. *Scullard*, [1898] 2 Q. B. 565. See also *Irwin* v. *Waterloo Taxi-Cab Co.*, [1912] 3 K. B. 588; 107 L. T. 288; 28 T. L. R. 567.

pay wages, it was held that the driver was not their servant, and they were not liable for his negligence. The ladies would no doubt give directions as to the places to which they should be driven, but not as to the manner in which the horses should be driven (*a*).

(3) It is held that upon the construction of the Metropolitan Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them, although, in fact, no such relationship exists, the relationship apart from statute being that of bailor and bailee, and not that of master and servant (*b*). But if the driver is in fact the servant of some person other than the proprietor, that person may also be liable as the driver's master (*c*).

Similarly, where by the negligence of the driver of a buggy, the plaintiff's horse was run against and killed, it was held on the authority of Bombay Act VI. of 1863, that the relationship between the proprietor and driver of the buggy was that of master and servant, and consequently the proprietor was liable for the driver's negligence (*d*).

Servant for particular purpose.

(4) In *Rourke* v. *White Moss Colliery Co.* (*e*), the defendants were sinking a shaft in their colliery and agreed with one Whittle to do the sinking at so much per yard. The defendants agreed to supply an engine and engineer at the mouth of the shaft. The engineer was employed and paid by the defendants, and was their general servant, but was at the time under the orders and control of Whittle, and it was held that he was, for the particular purpose, the servant not of the defendants but of Whittle, and consequently the defendants were not liable for his negligence.

Compulsory servants.

(5) If a master is compelled by law to employ a particular person as his servant and has no power of selection

(*a*) *Quarman* v. *Burnett*, 6 M. & W. 499.

(*b*) *Venables* v. *Smith*, 2 Q. B. D. 279; and *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281 [C. A.].

(*c*) *Keen* v. *Henry*, [1894] 1 Q. B. 292.

(*d*) *The Bombay Tramway Co.* v. *Khairaj Tejpal*, 7 Bom. 119; see also *David Bruce* v. *Kyaw Zin*, 45 I. C. 822.

(*e*) 2 C. P. D. 205 [C. A.], and see *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629 [C. A.]; *Bain* v. *Central Vermont Ry. Co.*, [1921] 2 A. C. 412; *Société Maritime Francaise* v. *Engineering Co. Ld.*, [1921] A. C. 417 n; *Abdul Latiff* v. *Pauling & Co.*, 19 Bom. L. R. 167; 38 I. C. 773.

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left to himself, he is not answerable for the wrongful acts of such servant. Where the defendant's steam vessel, belonging to the port of London, while proceeding, in charge of a duly licensed pilot, down the river Thames, came into collision, through the fault of the pilot alone, with the plaintiff's barges, it was held that the defendants were not liable, as pilotage was compulsory in the port of London within the meaning of the General Pilotage Act, 1825 (*a*).

Similarly where a steamer of the defendant company, under the charge of a pilot, ran down the plaintiff's vessel, it was said that when the accident happened through the negligence of the pilot in the management of the vessel, the defendants could not escape liability until they could show that the fault was that of the pilot alone (*b*).

Scope of employment.

But the master's liability for his servant's tort is limited by the consideration of the servant's acting within the scope of his employment.

Whether a servant is acting within the scope of his employment is a question partly of law and partly of fact. Generally, as long as a servant is doing the kind of thing for which he is employed, he is acting within the scope of his employment, though he may have had no express command to do the particular thing complained of (*c*). But even whilst doing things of the kind for which he is employed, he gets outside the scope of his employment when he does them not for his master's benefit, but for his own private purposes.

(1) Where a youth employed in a garage while drawing spirit from a drum into a tin, lighted a cigar and threw the match about the floor and the premises took fire by the ignition of oil and petrol on the floor, it was held that the servant was guilty of negligence in the scope of his employment and that the employers were liable to the owners of the premises for the resulting damage (*d*).

Illustrations.

(2) Where a master entrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so

(*a*) *The Umsinga*, 81 L. J. 65; 106 L. T. 722; *The Hankow*, 4 P. D. 197; *The Mercedes de Laringa*, [1904] P. 215.

(*b*) *Muhamed* v. *P. & O. S. N. Co.*, 6 B. H. C. (O. C. J.) 99.

(*c*) *Iswar Chunder* v. *Satish Chunder*, 30 Cal. 207.

(*d*) *Jefferson* v. *Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281.

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drove over the plaintiff, the master was held not to be responsible, on the ground that the wrong was not committed in the course of his employment (*a*). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not have been considered as taking him out of his master's employment (*b*).

(3) And where a servant does a kind of work for which he is not engaged, he is not acting within the course of his employment so as to make the master liable for his negligence. Thus, when an omnibus conductor drove the omnibus, and whilst so doing negligently ran into the plaintiff, it was held that, in the absence of evidence that the conductor was authorised to drive the omnibus, the defendants were entitled to judgment (*c*). Similarly where the defendant's servant broke a filter and the proprietor of the hotel sued for damages, it was held that the defendant was not liable, as the servant, in breaking the filter, was not acting within the scope of his employment, nor on the defendant's business, nor for his benefit (*d*).

Wilful torts.

(4) In *Barwick* v. *English Joint Stock Bank* (*e*), the defendants were held liable for the fraudulent statements of their manager made for the benefit of the defendants, and in the course of his business, the statements being made in answer to inquiries by the plaintiff and being to the effect that a customer of the bank was a person of financial stability. These statements were untrue to the knowledge of the manager, and were made with intent to deceive but not for the benefit of the manager. So where a peon of a Zamindar started a prosecution in the interest and for the benefit of the Zamindar and the prosecution failed, the Zamindar was made liable in damages for malicious prosecution (*f*).

(*a*) *Storey* v. *Ashton*, L. R. 4 Q B 476.

(*b*) *Mitchell* v. *Crasweller*, 22 L. J. C. P. 105; *J. Rand Ld.*, v. *Craig*, [1919] 1 Ch 1.

(*c*) *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530 [C. A.]. See also *Houghton* v. *Pilkington*, [1912] 3 K. B. 308; *Glasgow Corporation* v *Lorimer*, [1911] A. C. 209; *Cox* v. *Midland Counties Rail. Co.*, 3 Exch. 268. See also *Ricketts* v. *Thomas Tilling Ld.*, [1915] 1 K. B. 644.

(*d*) *Gray* v. *Fiddian*, 15 Mad. 73.

(*e*) L. R 2 Ex. 259 [Ex. Ch.].

(*f*) *Sarat Chandra Roy Choudry* v. *Dawlat Singh*, 10 C. W. N. 723; *Iswar Chunder* v. *Satish Chunder*, 30 Cal. 207. See also *Sherjan Khan* v. *Alimuddi*, 43 Cal. 511 (a case of illegal attachment).

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Where a bank manager fraudulently told a customer that certain transfers of mortgage debentures were valid, though he knew they were forged, the bank was held not liable for the fraud of the servant, as he had committed it not for the benefit of the bank, but for his own benefit (*a*). So where the servants in the Government treasury at Chittagong misappropriated the money payable for a cheque on that treasury, and the Secretary of State was sued for it, it was held that the servants did not commit the fraud and misappropriation either for the benefit of the Secretary of State or for the purposes of the agency, and so the latter was not liable (*b*).

But the decision in *Lloyd* v. *Grace Smith & Co.* (*c*) has rendered the intention of the servant to benefit his employer no longer a basis of the latter's liability. Accordingly it was held that the owner of a boat was liable to the owner of the goods carried in his boat for the loss caused by the misappropriation by the former's boatmen (*d*).

Tort expressly forbidden.

(5) Where an omnibus driver, contrary to the express instructions of his employers, so drove as to obstruct a rival omnibus with a view to increasing his takings, it was held that his employers were liable, as he was acting at the time in the course of his employment, and, as he thought, for their benefit (*e*). But where a driver to gratify his own spite struck the horses of a rival with his whip, his employers were held not liable (*f*). In the one case the driver was acting for his employers' benefit; in the other solely for his own.

(*a*) *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co*, 18 Q. B. D. 714 [C. A.]; *Aiken* v. *Caledonian Rail Co.* [1912], 50 Sc. L. R. 45 (where the slander by servant was meant to gratify his personal spite and not for the benefit of master).

(*b*) *Gopal Chandra* v. *Secretary of State for India*, 36 Cal. 647; (following *Bombay Burma Trading Corporation, Limited* v. *Mirza Mahomed Ally and Burma Co., Limited*, 4 Cal. 116; 5 I. A. 130; and *D. McLaren Morrison* v. *S. Vers-Choyle*, 6 C. W. N. 429); but see *Lah Chand* v. *Agra Bank, Limited*, 18 I. A. 111 (where the servant bonâ fide paid money to the wrong person, and so the act was within the purposes of the agency). See also *Shivabhajan Durga Prasad* v. *Secretary of State*, 28 Bom. 314; and *Dayomal* v. *Manager, Encumbered Estates in Sindh*, 1 S. L. R. 244.

(*c*) [1912] A. C. 716.

(*d*) *Dinabandhu Saha* v. *Abdul Latif Mollah*, 50 Cal. 258.

(*e*) *Limpus* v. *London General Omnibus Co*, 1 H. & C. 526.

(*f*) *Croft* v. *Alison*, 4 B. & A. 590.

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Wrongful arrest by servants.

(6) In *Poulton* v. *London and South Western Rail. Co.* (*a*), a station master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff and detained him in custody until it was ascertained by telegraph that all was right. **The railway company had no power whatever to arrest a person for non-payment for carriage of a horse,** and therefore the station master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station master; and MELLOR, J., said: "If the station master had made **a mistake in committing an act which he was authorised to do,** I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station master acts in **a manner in which the company themselves would not be authorised to act,** and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns."

(7) In an earlier case in which a station master and a policeman employed by a railway company wrongfully arrested a man for not paying his fare, the company was held liable, as **the company had power to arrest a passenger for travelling without paying his fare,** and must be taken to have authorised the officials to take into custody persons whom they believed to be committing that offence. The officials made a mistake in the particular case, but it was "a **mistake made within the scope of their authority**" (*b*).

It is submitted that these two decisions last quoted together with *Ormiston* v. *G. W. Ry. Co.* (1917), establish no more than this, that where an act is done by the servant of a company and such act is *ultra vires* the company, authority to do such act cannot be *implied*. Nothing in these decisions tends to relieve a company from the consequences of the tortious acts of its servants if *expressly* authorised by the proper authority in the company.

Assaults by servants.

(8) So, again, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (*c*), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being

(*a*) L. R. 2 Q. B. 534, followed in *Ormiston* v. *G. W. Rail. Co.*, [1917] 1 K. B. 598 and *Girjashankar* v. *B. B. & C. I. Ry.*, 43 Bom. 103.

(*b*) *Goff* v. *Great Northern Rail. Co.*, 3 E. & E. 672.

(*c*) L. R. 7 C. P. 415.

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pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' byelaws did not expressly authorise the company's servants to remove any person being in a wrong carriage or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but, nevertheless, the court considered that the act of the porter in pulling the plaintiff out of the carriage was an act done in the course of his employment as the defendants' servant.

In that case WILLES, J., says: "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine according to the circumstances that arise, when an act of that class is to be done and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

Criminal acts.

(9) The defendants employed a manager to manage a branch of their business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person living in the plaintiff's house, and on one of the instalments being in arrear he went to the plaintiff's house and removed the furniture. Whilst so doing he assaulted the plaintiff. The jury found that the manager committed the assault in the course of his employment, and it was held that the defendants were liable. The manager was employed to get back the furniture and committed the assault for the purpose of furthering that object and not for private purposes of his own, and the defendants were held liable for the wrongful act of their servant although the assault was a criminal offence (*a*).

(*a*) *Dyer* v. *Munday*, [1895] 1 Q B 742; [C. A]. As to criminal liability of master for servant's acts, see *Queen* v. *Tyab Ali*, 24 Bom. 423; *E* v. *Jeevanji*, 9 Bom. L. R. 967; *Emperor* v. *Behari Lal*, 34 All. 146; *Babu Lal* v. *Emperor*, 34 All. 319; *Uttam Chand* v. *Emperor*, 39 Cal. 344; *Bibhuti Bhusan* v. *Bhuban Ram*, 46 Cal. 515; *In re Velayuda Modali*, 43 Mad. 438; *Sayyid Rahim* v. *Emp.*, 11 N. L. R. 6; 29 I. C 325; *Gambhir Chand* v. *Secry., Municipal Committee, Nagpur*, 48 I. C. 886; *Emp.* v. *Ugyaw*, 9 L. B. R. 112; 44 I. C. 347.

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(10) So, too, a corporation is liable for the libels or slanders published by its servants and uttered within the scope of their employment (*a*), but not for those outside the scope of their employment (*b*). Where the secretary of a municipal board illegally obtained a distress warrant for the benefit of the board and in the execution thereof sold the plaintiff's property, the latter became liable in damages (*c*). When a passenger on a tramcar offered a penny in payment of his fare and the penny, though slightly marked, was not defaced and was legal tender, the conductor refused to accept it and the passenger was taken to the police station and detained there for ten minutes. In an action for false imprisonment against of the owners of the tramcar it was held that the employees of the defendants were acting within the scope of their employment (*d*)

ART. 28—*Unauthorised Delegation by Servant.*

A master is not liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties. A servant may have express authority, and in some cases may have implied authority, to delegate his duties to another, but if without such authority he delegates his duties to another, that other does not become the agent of the master.

Illustrations.

(1) Thus, where the driver and conductor of an omnibus authorised a bystander to drive the omnibus (the driver having been ordered to discontinue driving by a policeman who thought he was drunk), and the bystander, whilst driving, negligently injured the plaintiff, it was held that the defendants were not liable as the bystander was not their agent (*e*).

(*a*) *Citzen's Life Assurance Co.* v. *Brown*, [1904] A. C. 423 [P. C.]; *Motilal Raha* v. *Indra Nath Bonerjee*, 36 Cal. 907.

(*b*) *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209.

(*c*) *Municipal Board of Mussoorie* v. *H. B. Goodall*, 26 All. 482.

(*d*) *Percy* v. *Glasgow Corporation*, [1922] 2 A. C. 299.

(*e*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84 [C. A.].

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(2) But where the driver of a cart negligently left the cart in custody of a lad whose duty it was to go with the cart to deliver parcels, but had been forbidden to drive, and the lad drove the cart so that it collided with the plaintiff's carriage, the employer of the driver was held liable **for the negligence of the driver in leaving the cart in custody of the lad.** But the employer would not have been liable for the negligence of the lad, as he was not acting within the scope of his employment, and the driver had no authority to delegate the driving to him (*a*). So where the driver of a tonga entrusted it to a boy, without authority or necessity, and owing to the boy's negligence the tonga caused damage to the plaintiff's horse, the master was not liable for the boy's negligence, the case being governed by the rule in s. 190 of the Indian Contract Act, that a servant cannot ordinarily delegate his authority (*b*).

ART. 29.—*Servants of the Crown.*

The heads of Government departments and superior officers are not liable for the torts of their subordinates committed in carrying out the business of the Crown unless they have themselves ordered or directed the commission of the tort (*c*).

(*a*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240 [C. A.]; *R.* v. *Earl of Crewe* [1910] 2 K. B. 576; *Roper* v. *Public Works Commissioners*, [1915] 1 K. B 45; *Steel* v. *Belfast Corporation*, [1919] 2 T. R. 125.

(*b*) *Sardar Khan* v. *W. G. Gilmore*, 3 N. L. R. 101 (following *Gwilliam* v. *Twist*, *supra*).

(*c*) *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178 [C. A.]. As to the liability of the Secretary of State for India for torts of public servants, see *P. & O. S. N. Co.* v. *Secretary of State for India*, 5 B H. C. R. 1; *Nobin Chander Dey* v. *Secretary of State for India*, 1 Cal. 11; 24 W. R. 309; *Secretary of State for India in Council* v. *Guru Proshad Dhur*, 20 Cal. 51; *Secretary of State for India* v. *Hari Bhaji*, 5 Mad. 273; *Vijia Raghava* v. *Secretary of State for India*, 7 Mad. 466; *Jehangir M. Cursetji* v. *Secretary of State for India*, 27 Bom. 189; *Shivabhajan* v. *Secretary of State for India*, 28 Bom 314; *Ganoda Sundary* v. *Nalini Ranjan Raha*, 36 Cal. 28; *Mathradas* v. *Secretary of State for India*, 5 S. L R. 82; 11 I. C. 58; *Ramasami Iyengar* v. *Muthusami Iyer*, [1912] 1 M. W. N. 42; 13 I. C 799; *Motilal Ghose* v. *Secretary of State*, 9 C. W. N. 495 *Mumtaz Hussein* v. *Lewis*, 7 A. L. J. 301;

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The head of a Government department is not the master of the Government servants belonging to the department; nor are soldiers or naval seamen the servants of the officers who command them. All are servants of the Crown, serving under a common master. Though the soldier is absolutely subject to the orders of his officer he is no more his servant in law than is a stable boy, the servant of the coachman, or a railway porter, the servant of the station-master or the general manager of a railway company (*a*).

SECTION V.—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTORS.

ART. 30.—*The General Rule.*

(1) A principal is not liable for the collateral negligence of an independent contractor, that is, for a negligent act or omission which arises incidentally in the course of the performance of the work.

(2) But to this rule there are five exceptions:

(*a*) Where an independent contractor is employed to do an act unlawful in itself, the principal is liable for the direct consequences of such act, and is also liable for the consequences of the agent's negligence in the course of doing the act (*b*).

Mathradas v. *Secretary of State for India*, 5 S L. R. 140; 13 I. C. 237; *Srinivasa Prasad Singh* v. *Kesho Prasad Singh*, 15 C. W. N. 475; 9 I. C. 862; *Ross* v. *Secretary of State for India*, 37 Mad. 55; *Secretary of State for India* v. *Moment*, 40 Cal. 391 P. C.; *Evans* v. *Secretary of State*, 143 P. R. 1919; *Secretary of State* v. *Cockcraft* 39 Mad. 357 (where most of the earlier cases are noticed).

(*a*) *Stone* v. *Cartwright*, 6 Term Rep. 411.

(*b*) *Ellis* v. *Sheffield Gas Consumers Co.*, 2 E. & B. 767.

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(*b*) If the principal is under an obligation by contract or statute to do a particular thing, and he employs an independent contractor to do it, he is liable if the contractor neglects to do the thing, or does it improperly. He cannot get rid of his duty by employing an agent (*a*).

(*c*) Where the thing which the independent contractor is employed to do will be a nuisance, or is likely in the ordinary course of events to cause damage, unless proper precautions are taken, the principal is liable for the neglect of the contractor to take those precautions (*b*).

(*d*) Where the employer actually interferes in the contractor's work (*c*).

(*e*) In cases within S. 4 of the (English) Workman's Compensation Act, 1906 and within S. 12 of the (Indian) Act VIII of 1923 which give servants of contractor a right to compensation from contractor's employer.

Comment on above rule.

It will be noticed that the liability of one who employs another to do work is not so extensive where the person employed is an independent contractor as it is where that other is a servant. A master has control of the servant as to the way he does his work, and it is his duty to see that the work is so done as not to cause damage to others—so he is liable for the collateral negligence of the servant. When an independent contractor is employed, the principal is only liable for acts which he has expressly or impliedly

(*a*) *Hole* v. *Sittingbourne and Sheerness Rail. Co.*, 6 H. & N. 488. See *Municipal Council of Vizagapatam* v. *William Foster*, 41 Mad. 538.

(*b*) *Hughes* v. *Percival*, 8 App. Cas. 443.

(*c*) *Burgess* v. *Gray*, 1 C. B. 578.

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authorised. But a person who is under a duty to do something cannot evade that duty by deputing its performance to another. So if a person is under an obligation to do something and he employs an agent to do it, he is responsible for any neglect of the agent to perform that duty properly.

So, too, if a person chooses to do something which he does at his peril, or something which will be dangerous if not properly done, he must see that the person he employs to do the work does it properly. Having authorised the work, he cannot escape responsibility for its being carried out in such a manner as not to be dangerous.

Pickard v. *Smith.*

In the leading case (*a*) a railway company had let the refreshment rooms and a coal cellar to the defendant, Smith. The opening for shooting the coals into the cellar was on the arrival platform. Whilst the servants of a coal merchant (an independent contractor) were shooting coals into the cellar for Smith, the plaintiff, a passenger on the railway, in passing out of the station, without any fault on his part, fell into the cellar opening which was insufficiently guarded owing to the negligence of the servants of the coal merchant. The court held that Smith was liable, although the coal merchant was an independent contractor and his servants were not Smith's servants. WILLIAMS, J., in delivering the judgment of the court, said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently if an independent contractor is employed to do a lawful act and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. . . . That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by a parity of reasoning to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer and neglects its fulfilment whereby an injury is occasioned. Now in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it whilst open and to close it when the coals were all put in. The act of opening it was the act of the employer though done through the agency of the coal merchant; and the defendant having thereby caused

(*a*) *Pickard* v. *Smith*, 10 C. B. (N. S.) 470; *Holliday* v. *Nat. Tel. Co.*, [1899] 2 Q. B. 392.

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danger was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having entrusted it to a person who also neglected it furnishes no excuse, either in good sense or law."

Illustrations. Independent contractors.

(1) A railway company was empowered by Act of Parliament to construct a railway bridge over a highway. The company employed a contractor to do the work. A servant of the contractor negligently caused the death of a person passing underneath on the highway by allowing a stone to fall on him. The contractor would no doubt have been liable for the negligence of his servant, but in an action brought by the administratrix of the deceased against the railway company the defendants were held not liable for the negligence of the workman, being that of an agent who was not their servant, and merely collateral to the work which he was employed to do (*a*). So, in an action for damage caused to the plaintiff's premises by excavations made under the authority of Bengal Act VI. of 1836 for drainage purposes, the defendants showed that the execution of the work was entrusted to competent contractors, and were consequently exonerated from liability (*b*). Similarly where the Government employed a contractor to open a new road and owing to insufficient lighting the plaintiff's buggy broke down and plaintiff was injured, the Secretary of State was held not answerable because he came within the established rule that "one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a legal way" (*c*).

Illustrations of exceptions.

(2) A company, not authorised to interfere with the streets of Sheffield, directed their contractor to open trenches therein ; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself an unlawful act (*d*).

(3) So where the defendants were authorised, by an Act of Parliament, to construct an opening bridge over a navigable river, a duty was cast upon them to construct it

(*a*) *Reedie* v. *London and North Western Rail. Co*, 4 Ex. 244. If the stone had dropped after it had been definitely placed in position, they would have been liable.

(*b*) *Ullman* v. *Justices of the Peace for Calcutta*, 8 B. L. R. 265.

(*c*) *Corporation of Calcutta* v. *Anderson*, 10 Cal. 445.

(*d*) *Ellis* v. *Sheffield Gas Consumers Co*, 23 L. J. Q B. 42.

properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable under exception (b), and could not excuse themselves by throwing the blame on their contractors (*a*). Similarly where the municipality of Lahore employed a contractor to repair a public road, and owing to the negligence of the contractor in lighting the road under repair the plaintiff, while driving along the road, sustained damage, the municipality were held liable on the ground of a violation of a statutory obligation imposed on them (*b*). Likewise in the Calcutta case referred to above the corporation were made liable for damage caused by a dangerous obstruction, when such obstruction resulted from a permission granted by the commissioners of the corporation (*c*).

(4) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to have his house supported by defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—*Held*, on the principle above laid down (exception (c), that the defendant was liable (*d*).

(5) A district council employed a contracter to make up a highway, which was used by the public but was not repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil unlighted and unprotected. The plaintiff, walking along the road after dark, fell over the heap and was injured. In an action against the district council and the contractor to recover damages, it was held that, as from the nature of the work danger was likely to arise to the public using the road, unless precautions were taken, the

(*a*) See *Hole* v. *Sittingbourne and Sheerness Rail Co.*, 6 H. & N. 488; *Hardaker* v. *Idle District Council*, [1896] Q. B. 335; *The Snark*, [1899] P. 74.

(*b*) *Keough* v. *Municipal Committee of Lahore*, 108 P. R. 1883.

(*c*) *Corporation of Calcutta* v. *Anderson*, *supra*.

(*d*) *Bower* v. *Peate*, Q. B. D. 321, approved in *Dalson* v. *Angus*, 6 App. Cas. 740, and *Hughes* v. *Percival*, 8 App. Cas. 443; *Aliter*, if the work is not dangerous; *Wilson* v. *Hodgson*, 85 L. J. K. B. 270.

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negligence of the contractor was not collateral to his employment, and the district council (as well as the contractor) were liable (*a*).

(6) Where the defendant maintained a lamp hanging over a highway for his own purposes, it was his duty to maintain it so as not to be dangerous to the public, and when he employed a contractor to repair it, but the contractor did his work badly, the defendant was liable for injury caused thereby to a person passing on the highway (*b*).

(7) Where a contractor was employed to clear and burn the bush on land belonging to the defendants, and he negligently lit a fire on the land and permitted it to spread on to the plaintiff's land, the defendants were held liable, even though the contractor in lighting the fire had disregarded the express stipulations as to the time at which the fire should be lit, on the ground that, having authorised the lighting of the fires, they were bound not only to stipulate that precautions should be taken, but to see that they were taken (*c*).

(8) In an action for damages for personal injuries caused by a fall in an unfenced pit which was bored by the second defendant through his contractor with the permission of the first defendants, the port trustees, it was held that the port trustees were not liable on the ground that "an owner or occupier who, without any negligence, either of commission or omission, licenses a proper person to enter on his land to do a lawful act, not in its nature dangerous or injurious to others, cannot be held liable in damages if the person so licensed does something of a different kind unknown to the owner or occupier, which may make the person who does it or his employer or principal liable for negligence ; but that the second defendant could not escape his liability as he had and exercised a close control and directed all the operations by the contractor. It was said that, as a general rule, when one has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, free from the control of the employer and according to his own methods, he will not be liable for the torts of such contractor, his sub-contractors

(*a*) *Penny* v. *Wimbledon Urban Council*, [1889] 2 Q. B. 72 [C. A.]; and see *Holliday* v. *National Telephone Co*, [1889] 2 Q B. 392 [C. A.]; *Hurlstone* v. *London Electric Rail. Co.*, 29 T. L. R. 514.

(*b*) *Tarry* v. *Ashton*, 1 Q B. D. 314.

(*c*) *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48 [P. C.].

and his servants, the test in such cases being whether the employer retained the powers of controlling the work and personally interfering with it (*a*).

(9) In an action by the plaintiffs against the municipal commissioners of Bombay for damages for injuries caused to their house by the negligence of the defendants' servants in digging a trench, it was held that in cases where the work was necessarily attended with risk the employer could not free himself from liability by binding the contractor to take effectual precautions and was personally liable, as well as the contractor, to repair any damage caused thereby (*b*).

(*a*) *Evans* v. *Trustees of the Port of Bombay and Another*, 11 Bom. 329.

(*b*) *Dhondiba Krishnaji* v. *Municipal Commissioners of Bombay*, 17 Bom. 307. See also *Municipal Committee of Lahore* v. *Nandlal*, 88 P. R 1913 ; 18 I. C. 816 ; *Municipal Council of Vizagapatam* v. *Foster*, 41 Mad. 538.

CHAPTER VII.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

SECTION I.—COMMON LAW.

ART. 31.—*Death generally destroys the Right of Action.*

(1) As a general rule, the right to sue and the liability to be sued for torts ceases with the life of either party (*a*).

(2) This rule does not apply where the tort was committed **by the deceased** and consists of :

(a) The appropriation by the deceased of property (or the proceeds or value of property) belonging to the plaintiff (*b*); or

(b) An injury to real or personal property committed by the deceased within six calendar months of his death (*c*).

The rule does not apply when the death is that of **the person who would have been plaintiff** if he had lived, and the tort consists of :

(a) An injury to *real* property of the deceased, committed within six calendar months of his death (*d*) ; or

(*a*) *United Collieries, Limited* v. *Simpson*, [1909] A. C. 383 ; 101 L. T. 129 ; 25 T. L. R. 618 ; *Chunilal* v. *Secretary of State*, 34 Bom. 769.

(*b*) *Phillips* v. *Homfray*, 24 Ch. D. 439 [C. A.].

(*c*) 3 & 4 Will. 4, c. 42, s. 2 ; see *Kirk* v. *Todd*, 21 Ch. D. 484 [C. A]. The action must be brought within six months of constitution of a personal representative.

(*d*) *Ibid.* The action must be brought within twelve months of death.

(b) An injury to the personal property of the deceased (*a*). Art. 31.

Indian law.

(3) (a) An action may be maintained *against* the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death (*b*).

(b) An action may be maintained *by* the executors, administrators or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death (*c*).

(c) *Exception.*—No causes of action for defamation, assault, as defined in the Indian Penal Code, or any personal injuries not causing the death of the party; nor actions in cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory, survive to and against his executors or administrators (*d*).

Where the death is that of the person injured the rule "*actio personalis moritur cum personâ*" only applies to

(*a*) 4 Edw. 3, c. 7; 25 Edw. 3, c. 5.

(*b*) Legal Representatives Suits Act (XII. of 1855), s 1. The action must be brought within two years from the date of the wrong. See Indian Limitation Act (IX of 1908), Arts. 33-35.

(*c*) *Ibid.* The action must be brought within one year from the date of the death of the person wronged. See Indian Limitation Act (IX of 1908), Art. 20.

(*d*) The Indian Succession Act (X. of 1865), s. 268; The Probate and Administration Act (V. of 1881), s. 89; *Sharifa* v. *Munekhan*, 25 Bom. 574.

Art. 31. torts of a purely personal nature, such as libel and assault; it does not apply to any torts whereby the personal property of the deceased has suffered (*a*). "The only cases in which, apart from the question of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased who has done the act, appear to be those in which the property or the proceeds of the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys" (*b*).

Illustrations. (1) An action to restrain the infringement of a registered trade mark may be brought by the executors of the owner of the trade mark, in the event of his dying before action brought, or, if brought, may be continued by his executors after his death (*c*).

(2) The case of *Hatchard* v. *Mège* (*d*) is an excellent example of the rule under consideration. There it was held that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action **only so far as it was a claim for libel**; but so far as the alleged tort was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage.

Act XII of 1855 (India). Act XII. of 1855 applies only to cases of actions commenced by legal representatives, and suits instituted in the lifetime of the injured person or the wrongdoer abate at death (*e*). The rule of abatement would apply where the estate of the wrongdoer did not in any way benefit by the

(*a*) *Twycross* v. *Grant*, 4 C. P. D. 40.

(*b*) *Phillips* v. *Homfray* 24 Ch. D. 439; *Tummala Nagabhushanam* v. *Sri Rajah Venkatadri*, 23 M. L. J. 255; 12 M L. T. 383.

(*c*) *Oakey & Son* v. *Dalton*, 35 Ch. D. 700.

(*d*) 18 Q. B. D. 771.

(*e*) *Krishna Behari Sen* v. *Corporation of Calcutta*, 31 Cal. 406; *Ramchode Das* v. *Rukmony Bhoy*, 28 Mad. 487; *Haridas Ramdas* v. *Ramdas Mathradas*, 13 Bom. 677; *Nagabhushanam* v. *Venkatadriappa Rao*, 23 M. L. J. 255; 17 I. C. 226; *Subramania Iyer* v. *Venkatarama Iyer*, 31 I. C. 4 (suit instituted by a manager of a joint family.)

wrong (*a*); but where a decree is once passed against the defendant during his lifetime, the cause of action becomes merged in the decree, and the legal representative is entitled to prosecute the appeal to get rid of the possible injury to the estate by liability under it (*b*). The rule has no application to criminal prosecutions (*c*).

"Personal injuries" as used in the Probate and Administion Act, s. 89, does not mean injuries to the body merely, but includes wrongs to the person which need not necessarily cause damage to the estate of the person wronged (*d*). Malicious prosecution is such an injury and an action for damages in that respect abates on the death of the claimant (*e*).

ART. 32.—*Effect of Bankruptcy.*

(1) The right of action in tort, belonging to one who becomes bankrupt, is not affected by his bankruptcy (*f*), unless the tort is one which causes actual loss to his estate, in which case the right passes to his trustee (*g*).

(*a*) *Haridas Ramdas* v. *Ramdas Mathradas*, *supra*; *Shrawan* v. *Bhiwa*, 8 M. L. J. 180; *Timmala Nagabhushanam* v. *Sri Rajah Venkatadri*, 23 M. L. J. 255; 12 M L. T. 383; *Shorifa* v. *Munekbhan*, 25 Bom. 574.

(*b*) *Gopal* v. *Ramachandra*, 26 Bom. 597; *Paramen Chetty* v. *Sundararaja Naik*, 26 Mad. 499; *Josiam Tiruvengadachariar* v. *Sami Iyengar*, 7 M. L. T. 195; 5 I. C. 937.

(*c*) *Hazara Singh* v. *Crown*, 2 Lah. 27; *Mahomed Ibrahim Sahib* v. *Shaik Dawood*, 44 Mad. 417.

(*d*) *Punjab Singh* v. *Ramautar Singh*, 4 Pat. L. J. 676; *Rustomji Dorabji* v. *Nurse*, 44 Mad. 357 F. B.

(*e*) *Ibid. Marwadi Mothiram* v. *Samnaji*, 31 M. L. J. 772; 38 I. C. 823. But see contra *Krishna Behari Sen* v. *Corporation of Calcutta*, 31 Cal. 993 and note (*e*) at page 84 *supra*.

(*f*) Bankruptcy Act, 1914. *Wilson* v. *United Countries Bank, Ltd.*, [1920] A. C. 120.

(*g*) See *Wright* v. *Fairfield*, 2 B. & Ad. 727; *Beckham* v. *Drake*, 2 H. L. Cas. 579; *Brewer* v. *Dew*, 11 M. & W. 625; *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Ex parte Vine, Re Wilson*, 8 Ch. D. 364 [C. A.].

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(2) A right of action for tort against one who becomes bankrupt is not destroyed by the bankruptcy, nor can the plaintiff prove in the bankruptcy for compensation (*a*).

Illustrations.

(1) Thus a bankrupt may, even during the continuance of the bankruptcy, sue another for libel or assault, or for seduction of his servant (*b*); and may, it is conceived, keep any damages which he may recover for his own use and benefit (*c*).

(2) So in an action for trespass and seizure of goods in which the plaintiff alleged damage to the goods, damage to the premises, and personal annoyance to himself and his family, and it was admitted that no substantial damage was done to the premises or the goods, it was held that the right of action did not pass to the trustee in bankruptcy (*d*).

(3) But where a tort in respect of property causes actual damage, so as to inflict loss on the bankrupt's creditors, the right of action passes to the trustee, and the bankrupt loses the right of suing for the abstract tort to his right (*e*), unless there were two distinct causes of action (*e*).

SECTION II.—STATUTORY LIABILITY FOR CAUSING DEATH.

Art. 33.—*Action by Personal Representatives of Persons killed by Tort.*

Fatal Accidents Act

(1) Whenever the death of a person is caused by a wrongful act, neglect or default of another which would (if death had not ensued) have entitled the party injured to maintain an action in respect thereof, then the wrongdoer is liable

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30 (2), and s. 37 (repealed); now 4 & 5 Geo. V. c. 59, s. 30 (1). *Watson* v. *Holiday*, 20 Ch. D. 780; 52 L. J. Ch. 543; *Ex parte Stone, Re Giles*, 37 W. R. 767.

(*b*) *Beckham* v. *Drake, supra.*

(*c*) *Ex parte Vine, supra.*

(*d*) *Rose* v. *Buckett*, [1901] 2 K. B. 449.

(*e*) *Brewer* v. *Dew, supra*, and *Hodgson* v. *Sidney, supra.*

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to an action, even although the circumstances amount in law to a felony (*a*).

(2) Every such action must be for the benefit of the wife, husband, parent and child of the deceased, and must be brought by and in the name of the executor or administrator of the deceased person (*b*).

(3) Where there is no personal representative, or no action is brought by him within six months, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative could have sued (*c*).

(4) In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought. The amount so recovered, after deducting the costs not recovered from the defendant, is divided amongst the before-mentioned parties (or such of them as may be in existence) in such shares as the jury by their verdict may direct (*d*).

(5) Not more than one action lies for the same cause of complaint, and every such action must be commenced within one year after the death of the deceased (*e*).

Fatal Accidents Act.

At common law no action lay against any person who by his wrongful act, neglect, or default caused the immediate death of another person, even though damage was thereby

(*a*) 9 & 10 Vict. c. 93 (usually called Lord Campbell's Act, 1846); Act XIII. of 1855, s. 1.

(*b*) 9 & 10 Vict. c. 93, s. 2 ; Act XIII. of 1855, s. 1.

(*c*) 27 & 28 Vict. c. 95, s. 1 ; and see *Holleran* v. *Bagnell*, 4 L. R. Ir. 740.

(*d*) 9 & 10 Vict. c. 93, s. 2 ; Act XIII. of 1855, s. 1.

(*e*) 9 & 10 Vict. c. 93, s. 4 ; Act XIII. of 1855, s. 2 ; Indian Limitation Act (IX. of 1908), Art. 21.

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directly caused to others by being deprived of his services or support. Still less could his personal representatives bring an action in respect of the wrong committed to the deceased himself. And this is still the law, except in so far as an action lies under Lord Campbell's Act. So a master cannot bring an action for injuries which cause the immediate death of his servant, though he suffers loss by being deprived of those services, nor can a father recover in respect of the funeral expenses incurred by reason of the death of his daughter caused by the negligence of the defendant (*a*).

Points to be noted.

The following points must be remembered—

(1) No action lies unless, had the deceased lived, he himself could have maintained an action at the time of his death. So it is a good defence that the deceased would have had no cause of action as his injuries were caused by his contributory negligence (*b*). So, too, if the deceased's cause of action would at the time of his death have been barred by a Statute of Limitations (*c*), or by his having accepted satisfaction for his injuries (*d*), or agreed not to sue (*e*), no action can be brought under the Act.

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased. **Parent** includes a grand-parent and a step-parent. **Child** includes a grand-child and a step-child, and a child *en ventre sa mere* (*f*), but not a bastard (*g*). The jury apportion the damages amongst these persons in such shares as they may think proper.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the

(*a*) *Clark* v *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.]. But the rule does not apply where the cause of action is *breach of contract* and the death was part of the damages (*Jackson* v. *Watson & Sons*. [1909] 2 K. B. 193) It has been held that where by the negligence of the defendant a servant is *injured* but not killed, the master may bring an action for loss of services, *sed quære* (*Berringer* v. *Great Eastern Rail. Co.*, 4 C. P. D. 163).

(*b*) *Pym* v. *Great Northern Rail. Co.*, 4 B & S. 396 [Ex. Ch.].

(*c*) *Williams* v. *Mersey Dock Board*, [1905] 1 K. B. 804 [C. A.].

(*d*) *Read* v. *Great Eastern Rail. Co.*, L. R. 3 Q. B. 555.

(*e*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357.

(*f*) *The George and Richard*, L. R. 3 A. P. & E. 466; 24 L. T. 717.

(*g*) *Dickinson* v. *North Eastern Rail. Co.*, 2 H & C. 735.

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deceased (*a*). "*Pecuniary* loss" means "some substantial detriment in a worldly point of view." Thus, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*b*): as where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*c*). Even loss of mere gratuitous liberality is sufficient (*d*). But where a father employed his son, who was a skilled workman, at the current rate of wages, and the son did not contribute to the father's support, it was held that the father had no claim, as he had suffered no pecuniary loss by the death of his son (*e*).

(4) But "where a man has no means of his own and earns nothing, his wife or children cannot be pecuniary losers by his decease. In the like manner when by his death the whole estate from which he derived his income passes to his widow or to his child (as was the case in *Pym* v. *Great Northern Rail. Co.* (*f*), no statutory claim will lie at their instance" (*g*). So, too, the jury cannot, in such cases, take into consideration the grief, mourning, and funeral expenses to which the survivors were put. And this seems reasonable; for, in the ordinary course of nature, the deceased would have died sooner or later, and the grief, mourning, and funeral expenses would have had to be borne then, if not at the time they were borne (*h*).

(*a*) *Franklin* v. *South Eastern Rail. Co.*, 3 H. & N. 211.

(*b*) *Pym* v. *Great Northern Rail. Co.*, 4 B. & S. 396 [Ex. Ch.]; *Franklin* v. *South Eastern Rail. Co*, *supra*; *Taff Vale Rail. Co.*, v. *Jenkins*, [1913] A. C. 1; *Ryan* v. *Oceanic Steam Navigation Co.*, 110. L. T. 641.

(*c*) *Hetherington* v. *North Eastern Rail. Co.*, 9 Q. B. D. 160.

(*d*) *Dalton* v. *South Eastern Rail. Co.*, 27 L. J. C. P. 227.

(*e*) *Sykes* v. *North Eastern Rail. Co.*, 44 L. J. C. P. 191. Damages have been awarded for the loss of domestic services of a wife (*Berry* v. *Humm*, [1915] 1 K. B. 627) and for loss of anticipated earnings of a daughter (*Taff Vale Rail. Co.*, v. *Jenkins*, [1915] A. C. 1).

(*f*) 2 B. & S. 759 [Ex. Ch.].

(*g*) *Per* Lord WATSON in *Grand Trunk Rail. Co. of Canada* v. *Jennings*, 13 App. Cas. 800, 804.

(*h*) *Blake* v. *Midland Rail. Co.*, 18 Q. B. 93; *Dalton* v. *South Eastern Rail. Co.*, 4 C. B. (N.S.) 296; *Clark* v. *London General Omnibus Co*, [1906] 2 K. B. 648 [C. A.]; *Ratilal Kalidas* v. *Madras Railway Co.*, 4 M. L. T. 238.

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(5) If the deceased obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*a*).

Insurance not to be taken into account.

(6) It was formerly held that where the deceased had insured his life, the jury in assessing damages ought to take into account the value of the policy payable on his death in diminution of damages. This is now, however, altered by the **Fatal Accidents Act, 1908** (*b*), by which the rule under Lord Campbell's Act is made the same as in common law actions for damages (*c*), and "*any sum paid or payable on the death of the deceased under any contract of assurance or insurance*" *is not to be taken into account.*

Act XIII of 1885 (India).

(7) By the law of England (Lord Campbell's Act) the jury are to give damages in proportion to the injury; by the law of British India, the court should award damages in proportion to the loss resulting to the party from such death (*d*). In assessing damages for the death of a child owing to a fall caused by the negligence of the defendants, the circumstances of the case and the position of the child and parents are to be looked at; but deductions might be made for the cost of maintenance during the years the child might reasonably be expected to live. Funeral expenses cannot be compensated for (*e*). The term "representative" in the Indian Act includes all or any one of the persons for whose benefit a suit can be maintained under the Act (*f*). The Court has power to divide damages awarded among the parties for whose benefit the action is brought (*g*).

(*a*) *Read* v. *Great Eastern Rail. Co*, L. R. 3 Q B. 555. But see *Daly* v. *Dublin, Wicklow and Wexford Rail Co.*, 30 L. R. Ir 514 [C. A.], where the Irish courts decided *contra*.

(*b*) 8 Edw. 7, c. 7.

(*c*) See Art. 40, *post*.

(*d*) *Ratanbhai* v. *G I. P. Ry. Co*, 8 B. H. C. R. (O. C. J.) 130; *Secretary of State for India in Council* v. *Gopal Singh*, 284 P. L. R. 1913; 20 I C 425; *Bishan Das* v. *Ram Labhaya*, 106 P. R. 1915; 32 I. C. 18; *Piaram* v. *Behari Ram*, 69 I. C 354. The principle of the Act is applicable as a rule of equity; *Rakhmabai* v. *Dhanraj*, 64 I. C. 311.

(*e*) *Narayan Jetha* v. *Municipal Committee of Bombay*, 16 Bom. 254; also *E. I. Rail. Co*, v. *Kalidas*, 28 Cal. 401.

(*f*) *Johnson* v. *Porto Novo Cundasami*, 28 Mad 479; *Vinayak* v. *G. I. P. Rail Co.*, 7 B. H. C. R. 113 (an adopted son could sue under the Act); *Sri Gopal* v *Ambadevi*, 52 P. R. 1914; 22 I. C. 846 (but not a person adopted by the widow after her husband's death.)

(*g*) *Syed Sadayu Kezu* v. *Krishnamohini Dasi*, 71 I. C. 346.

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The findings of a criminal court are not relevant in a civil court, but the criminal proceedings may be referred to to test the evidence offered in the civil court (*a*).

(*a*) *Haria* v. *Basant Kaur*, 117 P. R. 1912 ; 16 I. C. 491.

CHAPTER VIII.

OF DAMAGES IN ACTIONS FOR TORT.

ART. 34.—*Damages for Personal Injury.*

There is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, and the finding of the jury will only be disturbed—

(*a*) Where the amount of the damages awarded is so excessive that no twelve men could reasonably have given it (*a*);

(*b*) Where the court comes to the conclusion from the amount or other circumstances that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages (*b*);

(*c*) Where the smallness of the award shows that they have either failed to take into consideration some essential element (*c*), or have compromised the question (*d*).

omment. The court will not interfere with the verdict of a jury merely on the ground that the damages awarded (*e*) are more

(*a*) *Praed* v. *Graham*, 24 Q B. D. 53.

(*b*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*c*) *Phillips* v. *London and South Western Rail. Co.*, 4 Q. B. D. 406.

(*d*) *Falvey* v. *Stanford*, L R. 10 Q. B. 54; *Karavias* v. *Callinicos*, [1917] W. N. 323.

(*e*) *Britton* v. *South Wales Rail. Co.*, 27 L. J. Ex. 355.

than the court itself would have awarded. The court must be satisfied that the jury has not really acted reasonably on the evidence, but has been misled by prejudice or passion, or has acted on a wrong principle (*a*). The only power of the court, if they think the damages excessive, is to send the case down for a new trial. They cannot (except by consent) usurp the functions of a jury, and themselves assess the damages (*b*).

And where damage which is not actionable is combined with damage which is an actionable wrong, the former damage may be taken into consideration to swell the damages awarded on the actionable wrong (*c*).

So, in action for false imprisonment, libel, or malicious prosecution, the jury may take into account the injured feelings and reputation of the plaintiff, and not merely his pecuniary loss (*d*).

Assault.

Thus, to beat a man publicly is a greater insult and injury than to do so in private, and is accordingly a ground for aggravation of damages (*e*). But where the assault consisted of a slight push on the wrong impression of a trespass and there was no injury to person or reputation, the damages may be nominal (*f*). In the case of a criminal assault, the plaintiff is not entitled to include in his claim his costs of the criminal prosecution (*g*).

ART. 35.—*Damages for Injury to Property.*

(1) The damages in respect of injuries to property are to be estimated upon the basis of

(*a*) *Per* Lord HALSBURY, L C, in *Watt* v. *Watt*, [1905] A. C. 115; *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.].

(*b*) *Watt* v. *Watt*, [1905] A. C. 115.

(*c*) *Jackson* v. *Watson & Sons*. [1909] 2 K. B. 193; *Griffith* v. *Richard Clays & Sons*, [1912] 2 Ch. 291.

(*d*) *Huro Lal* v *Huro Chunder*, 12 W. R. 89; *Rai Jung Bahadur* v. *Rai Gudor Sahoy*, 1 C. W. N. 537; *Kasturibai Bhratar* v. *G. I. P. Ry. Co*, [1923] Bom 172.

(*e*) *Tullidge* v *Wade*, 3 Wils. 18.

(*f*) *Kumud Kant* v. *Bignold*, 68 I. C. 664.

(*g*) *Jagannath* v. *Hakim*, [1916] P. R. 17; 30 I. C. 485. See also *Fazal Imam* v. *Fazal Rasul*, 12 All. 166; *Churamoni Dasi* v. *Baidyanath Naik*, 32 Cal. 429.

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being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act (*a*).

(2) In actions for trespass to real property the measure of damages is the loss the plaintiff has sustained in consequence of the wrongful acts of the defendant, and not the benefit which accrues to the latter.

(3) When the wrong consists in depriving the plaintiff of his personal property the measure of damages is the market value of the property at the time of the commission of the wrong.

(4) Where the wrong results in the plaintiff's being temporarily deprived of the use of personal property, the measure of damages is the value of the use of which he is deprived.

Conversion.

(1) Thus, for the conversion of chattels, the full market value of the chattel at the date of the conversion, is, in the absence of special damage, the true measure (*b*). Where the conversion consists in a refusal to deliver them up to the person entitled to them, the value at the time of the refusal is the measure of damages (*c*) But the Court is not precluded from finding as damages the value at a subsequent time even up to the date of the trial (*d*).

If there is no market value, the actual value must be ascertained otherwise (*e*).

(*a*) See *Rust* v. *Victoria Dock Co.*, 26 Ch. D. 113 [C. A.].

(*b*) See *Bansidhar* v. *Santhal*, 10 All. 133; *Mahomed Mohsin* v. *Turab Ali*, 6 A. L. J. 441; 2 I. C. 163; *Crizzle* v. *Ally*, 8 Bur. L. R. 43; *Nandlal Thakersey* v. *Bank of Bombay*, 12 Bom. L. R. 316; 5 I. C. 457; *Azmat Ali* v. *Maula Baksh*, 5 A. W. N. 200; *Hasam Kasam* v. *Goma*, 3 B. H. C. (O. C. J.) 140; *McIvor* v. *Stainbank*, 5 M. H C. R 70; *Jacob Elias* v. *Dossa Kalian*, 2 S. L. R. 192; 15 I. C. 757.

(*c*) *Henderson & Co.* v. *Williams*, [1895] 1 Q B. 521 [C. A.].

(*d*) *Louis Dreyefus & Co.* v. *Firm of Ghandamal & Co.*, 13 S. L. R. 12; 25 I. C. 878.

(*e*) *France* v. *Gaudet*, L. R. 6 Q. B. 199.

(2) Where the defendant cut a ditch across the plaintiff's land, the measure of damages was the diminution in value of the land, and not the cost of restoring it (*a*).

Trespass to land.

(3) In *Whitwham* v. *Westminster Brymbo Coal and Coke Co.* (*b*), another principle was applied in peculiar circumstances. The defendants had wrongfully tipped on the plaintiff's land spoil from a colliery, and it was held that in the special circumstances the value of the land to *the defendants* for tipping purposes was the proper measure, as the defendants had had the use of the plaintiff's land for years, and they ought not to do this without paying for it.

(4) So, where coal has been taken, by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*c*).

Taking coal.

(5) Where, owing to a collision, the plaintiffs lost the use of a dredger for some weeks, they were entitled to recover as damages for the loss of the use of the dredger a sum equivalent to the cost of hiring such a dredger, although they were not out of pocket in any definite sum (*d*). And where a harbour board lost the use of a lightship by reason of its being damaged by collision, they recovered not only the cost of the repairs, but a sum for the loss of the use of the lightship, although its place was taken by a spare lightship they kept in reserve (*e*). But where the defendant detained a ship belonging to the plaintiff which was in use on a non-paying route purely for maintenance of business connection and future profit, loss of such future profit by such detention was held too remote (*f*). It is the duty of the plaintiffs to use all reasonable means to mitigate

Loss of use of a chattel.

(*a*) *Jones* v. *Gooday*, 8 M. & W. 146.

(*b*) [1896] 2 Ch. 538; *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*, [1908] A. C. 323.

(*c*) *In re United Merthyr Collieries Co.* L. R. 15 Eq. 46 [C.A.] *The Lodna Colliery Co. Ltd.* v. *Bipin Behary Bose*, 1 Pat. L. T. 84; 55 I C. 113.

(*d*) *The Greta Holme*, [1897] A. C. 596.

(*e*) *The Mediana*, [1900] A. C. 113.

(*f*) *The Bodlewell*, [1907] P. 286.

Art. 36. his loss and the measure of damage is the loss actually incurred (*a*).

ART. 36.—*Presumption of Damage against a Wrongdoer.*

If a person who has wrongfully converted property refuses to produce it, it will be presumed as against him to be of the best description (*b*).

Illustrations. (1) Thus, in the leading case (*b*), where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages on the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem.*

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*c*).

ART. 37.—*Consequential Damages.*

Where special damage has resulted **naturally** and directly from the tortious act it may be recovered; such damages must be either the intended result of the defendant's act or the natural and probable result of such act.

The difficulty in cases under this rule is to determine what damages are the intended or *natural* and probable result of the tortious act and what are too remote.

(*a*) *British Westinghouse Co.* v. *Underground Electric Rails*, [1912] A. C. 673; cf. this with the judgment of Lord Wrenbury in *Jamal* v. *Moolla Dawood & Co.*, [1916] 1 A. C. 175 at p. 179; applied in *Keck* v. *Faber*, 60 Sol. Jo. 253.

(*b*) *Armory* v. *Delamirie*, 1 Str. 504; 1 Sm. L. C 356; *Sundar Mani Chaudhrani* v. *Bhuban Mohun Choudri*, 11 W. R. 536. See also *Framji Hormasji* v. *Commissioners and Dy. Commissioners of Customs, Bombay*, 7 B H. C. R. (A. C.) 89.

(*c*) *Mortimer* v. *Cradock*, 12 L. J. C. P. 166.

Illustrations. Loss of earnings.

(1) If, through a person's wilful or negligent conduct, corporal injury is inflicted on another, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered, for it is the natural result of the *injuria* (*a*).

Mental shock.

(2) Where the tort occasions as a natural result mental shock, damages may be recovered in respect thereof. It was long doubted whether mental shock caused by fright without any bodily injury was a subject for damages, but it has now been decided that damages are recoverable in respect thereof (*b*).

Medical expenses.

(3) So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*c*).

Legal expenses.

(4) Similarly in an action for compensation for malicious prosecution, all costs properly incurred in the defence to the criminal charge are generally recoverable as damages (*d*).

Infection.

(5) A cattle-dealer sold to the plaintiff a cow fraudulently representing that it was free from infectious disease, when he knew that it was not; and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the

(*a*) *Phillips* v. *London and South Western Rail Co.*, 4 Q. B. D. 406; *Johnston* v. *Great Western Rail Co.*, [1904] 2 K. B. 250 [C. A.].

(*b*) *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669 (an action for negligence); *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57 (an action for damages for shock caused by the defendant, as a practical joke, falsely telling the plaintiff that her husband had had his legs broken in an accident); *Janvier* v. *Sweency*, [1919] 2 K. B. 316 (action for injury by uttering false words to threaten); *Manubens* v. *Leon*, [1919] 1 K. B. 208; *Lindsey* v. *Queen's Hotel Co, Ld.*, [1919] 1 K. B. 212 (actions for wrongful dismissal).

(*c*) *Dixon* v. *Bell*, 1 Stark. 287; and see *Spark* v. *Heslop*, 28 L. J. Q. B. 197.

(*d*) *Shama Charan Haldar* v. *Bihari Lal Koilay*, 14 W. R. 443; *Bannomali Nandi* v. *Hurrydos Byragi*, 8 Cal. 710; *Subba* v. *Virappa*, 5 Mad. 162; *Rai Jung Bahadur* v. *Rai Gudor Sahoy*, 1 C. W. N 537; *In re Sanjivi Reddy*, 9 M. L. T. 172; 8 I. C. 884; (but see as to counsel's fees, *Goday Narayan* v. *Ankitam*, 6 M. H. C R. 85). But no suit will lie to recover as damages the costs incurred in prosecuting the defendant in a criminal court, (*Fazul Imam* v. *Fazul Rasul*, 12 All. 166 overruling *Ram Lal* v. *Tularam*, 4 All. 97); *Churamani Dasi* v. *Baidya Nath Naik*, 32 Cal. 429.

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natural consequence of his acting on the faith of the defendant's representation (*a*).

Loss of ship.

(6) So, where a steamer (wholly to blame) collided with a sailing vessel, and destroyed its instruments of navigation, and in consequence of that loss, the sailing ship ran ashore, and was lost while making for port, it was held that the loss of the ship was the natural result of the collision, and that owners of the steamer were liable (*b*).

(7) But where defendant had an ordinary water supply and tap in his house and the tap was turned on and the waste-pipes plugged by the malicious act of a third person over whom defendant had no control, as no negligence was shown, defendant was held not liable for damage done to premises below from escape of the water (*c*).

(8) Again, where a steam lorry was left on a highway unattended and a third person succeeded in setting it in motion by operating a complex mechanism, as it was reasonable that defendant should have anticipated the successful interference of a third party he was held not guilty of negligence, and not liable for the damages resulting from the act of the third party (*d*).

Art. 38.—*Prospective Damages.*

The damages awarded must include the probable future injury which will result to the plaintiff from the defendant's tort because more than one action will not lie on the same cause of action.

Illustrations. Bodily injuries.

(1) So, when a young man of twenty-eight, who had been trained as a marine engineer, and intended to follow it as his profession but had not obtained a post, and was working for his father at a salary of £3 a week, was injured in a railway accident, it was held that £3,000 damages were not excessive. The salary which he would have been

(*a*) *Mullett* v. *Mason*, L. R 1 C. P. 559.

(*b*) *The City of Lincoln*, 15 P. D. 15 [C A]; *Weld-Blundell* v. *Stephen*, [1920] A. C. 956.

(*c*) *Rickards* v. *Lothian*, [1913] A. C. 263.

(*d*) *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148.

probably able to earn was £500 a year, and his physical condition prevented him from earning it. £3,000 represented his prospective loss from this cause (*a*).

(2) So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*b*).

Damage to property and person distinct torts.

(3) But where the same wrongful act causes damage to goods, and also damage to the person, it has been held that there were two distinct causes of action, for which separate proceedings might be prosecuted (*c*).

Continuing torts.

(4) And if the tort be a continuing tort, the principle does not apply; for in that case a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass or nuisance, if the defendant does not cease to commit the trespass or nuisance after the first action, he may be sued until he does. Whether, however, there *is* a continuing *tort*, or merely a continuing **damage**, is often a matter of difficulty to determine.

Successive subsidences caused by one act of defendant.

(5) In *Darley Main Colliery Co.* v. *Mitchell* (*d*), the appellants worked their mines too close to the respondent's property, and in consequence some cottages of the respondent were injured in 1868, and were repaired by the appellants. In 1882, in consequence **of the same workings which caused the damage of 1868,** a further subsidence took place, and the respondent's cottages were again injured. The case turned on the question of whether the respondent was barred by the Statute of Limitations, but incidentally it was decided that the tort was not the excavation, but the causing the respondent's land to subside. The excavation was no doubt the cause of the subsidence, but the tort itself was damage resulting from the infringement of the respondent's right of support, and consequently each separate subsidence was a distinct and separate cause of action for which a new action would lie.

(*a*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250 [C. A.]; *Phillips* v. *London and South Western Railway*, 5 C. P. D. 280; *Armsworth* v. *South Eastern Railway Co.*, 11 Jur. 758; *Vinayaga Mudaliar* v. *Parthasarathy Aiyangar*, 7 L. W. 415; 45 I C. 556; *Sriram* v. *Dehli Electric Tramways Co, Ld.* 75 P. R. 1919; 49 I. C. 435.

(*b*) *Gregory* v. *Williams*, 1 C. & K. 568.

(*c*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141 [C. A.].

(*d*) 11 App Cas. 127.

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(6) Where the defendant not only kept the plaintiff out of possession of his land, but cut down all the fruit-bearing and timber trees (*a*), and likewise where the plaintiff's land was flooded owing to the cutting of a bank of a reservoir (*b*), all profits that might have been realised were awarded as prospective damages (*c*).

ART. 39.—*Aggravation and Mitigation.*

The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*d*).

Illustrations.

Seduction under guise of courtship.

(1) In seduction, if the defendant had committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. "The jury did right, in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*e*).

Character of girl seduced.

(2) On the other hand, the previous loose or immoral character of the party seduced is ground for mitigation; the using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy (*f*).

(*a*) *Kumaree* v. *Bama Sundaree*, 10 W. R, 202.
(*b*) *Punnun Singh* v. *Meher Ali*, W. R. (1864) 365.
(*c*) See *Kari Basavana* v. *Veerabhadrappa*, 36 Mad 580.
(*d*) *Davis* v. *London and North Western Rail. Co.*, 7 W. R. 105.
(*e*) *Per* WILMOT, C J, *Tullidge* v. *Wade*, 3 Wils. 18.
(*f*) See *Verry* v. *Watkins*, 7 C. & P. 308.

(3) In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*a*).

Plea of truth in defamation

(4) Evidence of the plaintiff's *general bad character* is allowed in mitigation of damages in cases of defamation. But although evidence of general reputation of bad character is admissible, evidence of rumours and suspicions before the publication of the libel that the plaintiff had done what was charged in it, or of facts showing the misconduct of the plaintiff, is not admissible (*b*).

Plaintiff's bad character in defamation

(5) Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for £500 damages, the court refused to interfere, GIBBS, C.J., saying: "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done'? Would that be a compensation?" (*c*).

Insolent trespass

ART. 40.—*Insurance not to be taken into Account.*

In assessing damages whether for personal injuries or for injuries to property the jury ought not to take into account any sum which may be paid or payable to the plaintiff under any policy of insurance (*d*).

So where a plaintiff sued for damages for personal injuries received in a railway accident, and the jury found as damages £217, and it appeared that the plaintiff was entitled to receive £31 on an accident policy, it was held

(*a*) *Warwick* v. *Foulkes*, 12 M & W. 507.

(*b*) See *Scott* v. *Sampson*, 8 Q. B D 491, and *Wood* v. *Durham (Earl)*, 21 Q B. D 501; and as to giving particulars, see R S. C. Order XXXVI, r. 37.

(*c*) *Merest* v. *Harvey*, 25 Taunt 441; *Soha Lal* v *Lala Amba Prasad*, 20 A. L. J 983

(*d*) *Bradburn* v. *Great Western Rail. Co.*, L. R. 10 Ex. 1, and see *Yates* v. *Whyte*, 4 Bing N. C. 272.

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that the sum awarded by the jury ought *not* to be reduced by the sum of £31. If it were otherwise the defendant would get the benefit of the plaintiff's having insured, and in some cases might have to pay nothing. Insurance is a matter between the insurer and the assured, and ought not to affect the liability of the wrongdoer to pay in full the damages caused by his tort (*a*).

(*a*) *Bradburn* v. *Great Western Rail. Co.*, L. R. 10 Ex. 1, and see *Yates* v. *Whyte*, 4 Bing. N. C. 272; in cases of death the same rule is applied by the Fatal Accidents Act, 1908.

CHAPTER IX.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF TORTS.

Definition.

AN injunction is an order of a court (*a*) restraining the commission or continuance of some act (*b*).

Interlocutory or perpetual.

Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction, granted summarily on motion (*c*) founded on an affidavit, and before the facts in issue have been formally tried and determined. Such an injunction is granted to restrain the commission or continuance of some act until the court has decided whether a perpetual injunction ought to be granted. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief.

ART. 41.—*Injuries Remediable by Injunction.*

(1) Wherever a legal right, whether in regard to property or person, exists, a violation of that right will be prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at least

(*a*) A county court has now, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereof (*Ex parte Martin*, 4 Q. B. D 212; affirmed *sub nom. Martin* v. *Bannister*, *ibid.* 491 [C. A.]).

(*b*) As to mandatory injunctions, and as to the general principles guiding the courts in granting or refusing injunctions, see Strahan and Kenrick's Digest of Equity, Book III., s. 3, *Andrews* v. *Waite*, [1907] 2 Ch. 510.

(*c*) In the King's Bench Division applications for interlocutory injunctions are made by summons in chambers. On the original side of the Indian High Courts of Judicature, they are made by motion in court, and in the other Indian courts by petition.

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not without the necessity of a multiplicity of actions for that purpose (*a*).

Damages instead of injunction.

(2) The court has jurisdiction to give damages instead of granting an injunction, and will generally do so in cases where there are found in combination the four following requirements, *viz.*, where the injury to the plaintiff's legal rights (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*b*).

Interlocutory injunctions.

(3) To entitle a plaintiff to an **interlocutory** injunction, the court must be satisfied that there is a serious question to be tried at the hearing, and that, on the facts before it, there is a probability that the plaintiff is entitled to

(*a*) *Imperial Gas Light and Coke Co. Directors* v. *Broadbent*, 7 H. L. Cas. 690; *Jamnadas Shankerlal and Another* v. *Atmaram*, 2 Bom. 133; *G. I. P. Rail. Co.* v. *Nowroji*, 10 Bom. 390; *Apaji* v. *Apa*, 26 Bom. 735; *Jethalal* v. *Lalbhai*, 28 Bom. 298; *Framji Shapurji* v. *Framji Edulji*, 30 Bom. 319; *Behari Lal* v. *Ghisa Lal*, 24 All. 499; *Venkatachelam* v. *Zemindar of Sivagunga*, 27 Mad. 499; *Raja of Venkatagiri* v. *Raja Mudukrishna*, 28 Mad. 15; *Rama Udayan* v. *Subramanya Iyer*, 31 Mad. 171; *Binode Coomaree Dossee* v. *Saudomney Dossee*, 16 Cal. 252; *Belbhadar* v. *Sheik Barkat Ali*, 11 C. W. N. 85; 4 C. L. J. 370; *E. S. Levy* v. *D. E. Erza*, 33 C. L. J. 26; 66 I. C. 119; *Appayya Pantulu* v. *Puvvala Kantayya*, 14 I. C. 267; *Jairam Mali* v. *Babaji Vidur*, 1 N. L. R. 182; *Bhaosingh* v. *Hazari*, 7 N. L. R. 179; *Rewa* v. *Vrijvallabh*, 6 Bom. L. R. 41; *Mahadev* v. *Narayan*, 6 Bom. L. R. 123. As to multiplicity of suits, see *Gur Pershad* v. *Khuda Baksh*, 8 I. C. 687, and *Kirpadayal* v. *Rani Kishori*, 10 All. 80.

(*b*) *Per* BAGGALLAY, L. J., in *Sayers* v. *Collyer*, 28 Ch. D. 103 [C. A.], at p. 108; *Serrao* v. *Noel*, 15 Q. B. D. 549 [C. A.]; and *per* A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287 [C. A.], at p. 322; *Kalliandas* v. *Tulsidas*, 23 Bom. 786; *Tejumal* v. *Chabilomal*, 2 S. L. R. 65; *Bai Samrat* v. *Sardarsang*, 13 Bom. L. R. 905; 12 I. C. 381; *Ramchandra* v. *Raghbir Singh*, 67 I. C. 299.

relief (*a*). And that unless an interlocutory injunction is granted, it will become very difficult or impossible to do complete justice at a later stage (*b*).

To restrain publication of libel.

(4) An interlocutory injunction will be granted to restrain the publication of a libel, even though such libel affects the plaintiff in his character only, and not in his business. But an injunction to restrain the publication of a libel will only be granted in the clearest cases (*c*). And not where the libel, however unjustifiable, does not threaten immediate injury to the plaintiff (*d*).

Indian law.

The law relating to perpetual injunctions in India is contained in Chapter X. of the Specific Relief Act (*e*), and that relating to interlocutory or temporary injunctions in Order 39 of the Civil Procedure Code (*f*) Under the English law the right to an injunction is primâ facie a a right to which a plaintiff is entitled on proof that material injury has been sustained, so long as no circumstances are disclosed to deprive him of that primâ facie right; but under the Indian law an injunction would not be granted if pecuniary compensation would afford adequate relief (*g*).

Illustrations.

Nuisances.

(1) Thus, where substantial damages would be, or have been, recovered for injury done to land, or the herbage

(*a*) *Per* COTTON, L. J., in *Preston* v. *Luck*, 27 Ch. D. 497 [C. A.], at p. 506; *Joynarain* v. *Shippershad*, 6 W. R. Mis 1; *Mohinee* v. *Tehamoyee*, 13 W. R. 60; *Shadhiram* v. *Abdul Ali*, 1 A. L. J. 527; *Chandra Nath Pal* v. *Sree Govind*, 6 C. W. N. 308; *Israil* v. *Samser Rahman*, 41 Cal. 436; *Krishna Chandra Saha* v. *Hem Chandra Rai*, 21 C. L. J. 469; 29 I. C. 855.

(*b*) *Mogul SS. Co.* v. *McGregor, Gow & Co.*, 15 Q. B. D. 476.

(*c*) *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 [C. A.]; *Monson* v. *Tussaud's, Limited*, *Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 671 [C. A.].

(*d*) *Salomons* v. *Knight*, [1891] 2 Ch. 294 [C. A.].

(*e*) Act I. of 1877. See Illus. (p) to (w) to s. 54.

(*f*) Act V. of 1908.

(*g*) *Boyson* v. *Deane*, 22 Mad. 251; *Dhunjibhoy* v. *Lisboa*, 13 Bom. 252; *Umar* v. *Kewalmal*, 3 S. L. R. 30; 1 I. C. 958.

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thereon, by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance; for otherwise the plaintiff would have to bring continual actions (*a*)

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*b*).

(3) As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes and occupations, is a nuisance, and will be restrained (*c*).

Interference with light.

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, according to the ordinary notions of mankind, and to prevent the plaintiff from carrying on his business on the premises as beneficially as before, an injunction will be granted in cases in which damages do not afford an adequate remedy (*d*).

(*a*) *Tipping* v. *St. Helen's Smelting Co*, L. R. I. Ch. 66; similarly in the case of a fried fish shop, *Adams* v. *Ursell*, [1913] 1 Ch. 269; *Stearn* v. *Prentice Bros. Ltd.*, [1919] 1 K. B. 394; *Belvedere Co.* v. *Rainham*, [1920] 2 K B. 487. See *Appaji* v. *Appa*, 26 Bom. 735; *Bai Baicalji* v. *Perojshaw*, 40 Bom. 401; *Jawand Singh* v. *Mahommedan*, 1 Lah 140; *Burma Railways Co., Ltd.* v. *Rangoon Municipal Committee*, 13 Bur. L. T. 62; 59 I. C. 823; *Municipal Committee of Saugor* v. *Nilkanth*, 11 N. L. R 132; 31 I. C. 62.

(*b*) *Fenwick* v. *East London Rail. Co*, 20 Eq. 544; but see *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, in which the former case was distinguished.

(*c*) *Soltau* v. *De Held*, 2 Sim. (N. S.) 133. Note these were not bells of an Established church.

(*d*) See *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179: also *Nandkishore* v. *Bhagubhai*, 8 Bom. 95; *Dhunjibhoy Cowasji* v. *Lisboa*, 13 Bom. 252; *Ghanasam Nilkant* v. *Maroba*, 18 Bom. 474; *Sultan Nawazjung* v. *Rustomji*, 20 Bom. 704; *Yaro* v. *Sona-Ullah*, 19 All. 259; *Esa Abbas Sait* v. *Jacob Harron Sait*, 33 Mad 327; *Anath Nath Deb* v. *Gulstan*, 35 Cal. 661; *Muthukrishna* v. *Somalinga*, 21 M. L J. 742; 10 M. L. T. 131; 11 I. C. 642; *Thakur Das* v. *Abdul Hamid*, 2 Lah. L. J. 701; 67 I. C. 288.

Sewage pollution.

(5) An injunction will not be granted against a local authority who are committing a nuisance by sewage pollution when it is legally impossible for the authority to obey the terms of the injunction, because they have no power to stop up their sewers or prevent persons from using them, or when it is physically impossible. In such cases damages will be given instead (*a*).

Libel.

(6) It was formerly held that an injunction could not be granted to restrain the publication of a personal libel, even where it injuriously affected property (*b*). However, since the Judicature Act, 1873, the court has power to grant an injunction whenever it may appear to be just or convenient (s. 25 (8)). For some time the court was inclined to restrict this power to cases where a libel prejudically affected property (*c*); but it may now be considered settled that the court **has jurisdiction** to grant injunctions to restrain the publication of all libels (*d*); or slanders (*e*), even oral (*f*). However, the court is extremely chary of granting **interlocutory** injunctions in cases of libel. As Lord ESHER, M.R., said in *Coulson & Sons* v. *Coulson & Co.* (*g*): "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. *It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable.*"

In India the publication of statements, punishable under Chapter XXI. of the Indian Penal Code, may be restrained by injunction, even though it may be shown not to be injurious to property (*h*).

(*a*) *Att.-Gen.* v. *Dorking Union*, 20 Ch. D. 595 [C. A.]; *Earl of Harrington* v. *Derby Corporation*, [1905] 1 Ch. 205; *Dulverton Rural District Council* v. *Tracy*, 86 J. P. 217.

(*b*) *Gee* v. *Pritchard*, 2 Swan. 402; *Clark* v. *Freeman*, 11 Beav. 112; *Prudential Assurance Co.* v. *Knott*, 10 Ch. App. 142.

(*c*) *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763 [C. A.].

(*d*) See *per* COLERIDGE, L.C.J., in *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 [C. A], at p. 283.

(*e*) *British Railway Traffic and Electric Co Ltd.* v. *C. R. C. Co. Ltd. etc*, 85 J. P. Jo. 585.

(*f*) *Hermann Loog* v. *Bean*, 26 Ch. D. 306 [C. A].

(*g*) 3 T. L. R. 846 [C A.]; *Collard* v. *Marshall*, [1892] 1 Ch 578.

(*h*) Specific Relief Act, s. 55; Ill. (e). See *Shepherd* v. *Trustees of the Port of Bombay*, 1 Bom. 132.

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ART. 42.—*Public Convenience does not justify the continuance of a Tort.*

It is no ground for refusing an injunction that it will, if granted, do an injury to the public. But although an injunction is granted, its operation may be suspended, where it would work an injury to the defendant far outweighing the benefit to the plaintiff, to enable the defendant to provide for the new circumstances (*a*).

Illustrations.

(1) Thus, in the case of *Att.-Gen.* v. *Birmingham Borough Council* (*b*), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, their claim to do so, on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations, was untenable.

(2) And where a railway company were forbidden by statute to run trains across a level crossing at a greater speed than four miles an hour, it was held that they must be restrained by injunction at the suit of the Attorney-General, from running trains at a greater speed than four miles an hour, and that the court could not entertain the question whether the infringement of the statute caused any inconvenience to the public (*c*).

(*a*) *Stollmeyer* v. *Trinidad Lake Petroleum Co.*, [1918] A. C. 485.

(*b*) 4 K. & J. 528. But *cf.* Ill. (5), p. 107, *supra*.

(*c*) *Att.-Gen* v. *London and North Western Rail. Co*, [1900] 1 Q. B. 78 [C. A.].

CHAPTER X.

OF THE LIMITATION OF ACTIONS FOR TORT.

SECTION I.—THE STATUTES OF LIMITATIONS.

ART. 43.—*The Principal Periods of Limitation.*

Every action for tort must be brought within **six years** from the time when the cause of action is complete (*a*), except—

(a) Trespass to the person by assault or false imprisonment—within **four years** (*b*).

(b) Slander by words actionable *per se*—within **two years**; otherwise, on proof of special damage—within **six years** (*c*).

(c) Actions under Lord Campbell's Act—within **one year** from the death of the deceased (*d*).

(d) Actions under the Employers' Liability Act—within **six months**, or (if injured person be killed) within **one year** of the death (*e*).

(e) Actions for recovery of land—within **twelve years** (*f*).

(*a*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) Fatal Accidents Act 1846 (9 & 10 Vict. 93). See Indian Limitation Act (IX of 1908), Art. 33.

(*e*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4. See Indian Limitation Act, Art. 94.

(*f*) See Indian Limitation Act, Arts. 134 and 135, where the rule is more fully stated.

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(f) Actions for statutory penalties—within **two years** (*a*).

(g) Actions for damage by collision at sea—**within two years** (*b*).

(h) Infringements of copyright—within **three years** (*c*).

The Indian Limitation Act (IX. of 1908) prescribes the following periods for actions on tort :

(a) *One year*—in cases of false imprisonment, suits by executors, etc. under the Legal Representatives Suits Act, 1855, suits under the Indian Fatal Accidents Act, 1855, other injuries to person, malicious prosecution, libel, slander, seduction, inducing breach of contract, illegal, irregular or excessive distress, wrongful seizure of moveable property under legal process, loss of injury to goods by a carrier (*d*).

(b) *Two years*—in cases of conversion, suits against executors, etc. under the Legal Representatives Suits Act, 1855, and any other act of malfeasance, misfeasance and nonfeasance independent of contract, not otherwise provided for in the Act (*e*).

(c) *Three years*—in cases of obstruction to a way or watercourse, diversion of watercourse, trespass on immoveable property, infringement of copyright or any other exclusive privilege, and waste (*f*).

(d) *Twelve years*—for actions for recovery of land (*g*).

ART. 44.—*Commencement of Period.*

(1) If the cause of action is the doing of a thing, the action must be brought within the prescribed period after the actual doing of the thing complained of.

(*a*) Civil Procedure Act, 1833.
(*b*) Maritime Conventions Act, 1911, s.
(*c*) Copyright Act, 1911, s. 10. See Indian Act III of 1914.
(*d*) Arts. 19–31.
(*e*) Arts. 32—36.
(*f*) Arts. 37-41.
(*g*) Arts. 134—144.

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(2) But if the cause of action is not the doing of something but the damage resulting therefrom the period of limitation is to be computed from the time when the party sustained the damage (*a*).

(3) And where a tort has been fraudulently concealed by the defendant, and the plaintiff has had no reasonable means of discovering it, the statute only runs from the date of the discovery (*b*).

(4) Where the cause of action is complete but there is no one in existence able to bring the action or no defendant capable of being sued or the defendant is outside the united Kingdom (or British India), time does not run until this bar is removed, but no bar arising *after* the cause of action becomes available has any effect in suspending the operation of the statute (*c*).

Explanation.

The meaning of this rule is, that where the tort is the wrongful infringement of a right, the period of limitation runs immediately from the date of the infringement. But, on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then, as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

Concealed fraud.

The doctrine of "concealed fraud" is an equitable doctrine. It only applies where the tort has been fraudulently concealed **by the person setting up the statute**, or by some one

(*a*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127. See s. 24, Indian Limitation Act, 1908, *e.g.*, obstruction of public road, (*Ramphail Rai* v. *Raghunandan* 10 All. 498; *Siddeswara* v. *Krishna*, 14 Mad. 177): overflow of water (*Ramlal Singh* v. *Lill Dhary*, 3 Cal. 776); slander, *Ibin Husein* v. *Haidar*, 12 Cal. 109; *Parvati* v. *Mannar*, 8 Mad. 175; *Dawan Singh* v. *Mahip Singh*, 10 All. 425.)

(*b*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351 [P. C.]; *Oelkers* v. *Ellis*, [1914] 2 K. B. 139. See Indian Limitation Act, s. 18.

(*c*) *Rhodes* v. *Smithurst*, 6 M. & W. 351. See Indian Limitation Act, 1908, ss. 6 and 7.

through whom he claims. It would be inequitable to allow a person to take advantage of his own fraud by pleading the statute when that fraud had taken from the plaintiff the chance of bringing his action earlier (*n*).

Illustrations.

Taking away lateral support.

(1) Where A. owned houses built upon land contiguous to land of B., C., and D.; and E., being the owner of the mines under the land of all these persons, so worked them that the lands of B. sank, and after more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A's houses: —*Held*, that A's right of action was not barred, as the tort to him was the subsidence caused by the working of the mines, and not the working itself (*o*). And so, too, each fresh subsidence is a new cause of action for which a fresh action can be brought within six years of such subsidence (*p*).

Abstracting coal.

(2) But where a trespasser wrongfully worked *the plaintiff's coal*, in consequence of which the surface of the plaintiff's land subsided, it was held that the statute commenced to run from the working and taking away of the plaintiff's coal, and not from the subsidence; on the ground that the working of the coal was a complete tort, and that the subsidence was only a consequence of it (*q*).

Actions for recovery of chattels.

(3) A lease, belonging to the plaintiff, was fraudulently taken from him by his son, and deposited with B. to secure a loan made by B. to the plaintiff's son. The plaintiff was ignorant of this transaction. Subsequently B. became bankrupt, and his trustee in bankruptcy assigned the leasehold premises to the defendant. B. and the defendant were both ignorant of the fraud. The plaintiff then demanded the lease of the defendant, and upon his refusal began an action for wrongful detention and conversion of the lease; to which the defendant pleaded that the fraudulent deposit with B. was made more than six years before action brought, and that, consequently, the action was barred by the Statute of Limitations. The Court of Appeal, however, held that the statute only began to run when the plaintiff had a complete cause of action against the defendant, *i.e.*, *when he demanded the deed and was refused it*, and not from the receipt of the deed by B. In giving judgment, Lord ESHER, M. R.,

(*n*) See *Thorne* v. *Heard*, [1894] 1 Ch. 599 [C. A.]; affirmed, [1895] A. C. 495; *Thomson* v. *Lord Clanmoris*, [1900] 1 Ch. 718.

(*o*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503.

(*p*) *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

(*q*) *Spoor* v. *Green*, L. R. 9 Ex, 99.

said: "I am of opinion that, in the present case, the Statute of Limitations does not apply; it applies only to an action brought against the defendant in respect of a wrongful act done by the defendant himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations, though more than six years may elapse, and if the rightful owner recovers them, the other man cannot maintain an action against him in respect of them" (*a*). Art. 44.

(4) There is a great distinction between actions for the recovery of chattels and actions for the recovery of land. For the **Statutes of Limitations do not bar the right to chattels** after the prescribed period, but **only bar the plaintiff's remedy** against the wrongdoer; whereas **the Real Property Limitation Acts bar and extinguish not merely the remedy but also the right** (*b*). Consequently, if a plaintiff has allowed another to remain in possession of land, without acknowledgment, for twelve years, he will be barred, although he may never have demanded delivery up of possession (*c*). Where, however, an intruder goes out of possession of land before acquiring a statutory title, the statute ceases to run, and the title of the true owner remains unaffected, even although he does not himself retake possession until after the expiration of the statutory period (*d*). Actions for recovery of land.

ART. 45—*Continuing Torts.*

Where the tort is continuing, or recurs, a fresh right of action arises on each occasion (*e*).

(*a*) *Miller* v. *Dell*, [1891] 1 Q. B. 468 [C. A.], and see also *Spackman* v. *Foster*, 11 Q. B. D. 99.

(*b*) See 3 and 4 Will. 4, c. 27, s. 34, and 37 & 38 Vict. c. 57, s. 9.

(*c*) See *Scott* v. *Nixon*, 3 Dru. & War. 388; *Lethbridge* v. *Kirkman*, 25 L. J. Q B 89; and *Moulton* v. *Edmonds*, 1 DeG F. & J 246.

(*d*) *Agency Co.* v. *Short*, 13 App. Cas. 793; 59 L T 677 [P. C.]

(*e*) *Whitehouse* v. *Fellowes*, 10 C. B. (N. S) 765. See s. 23, Indian Limitation Act, 1908, *e g.*, diversion of watercourse, *Ponnusami Tevar* v. *Collector of Madura*, 5 M. H. C. R 6; injury to servient tenement, *Jogul Kishore* v. *Mulchand*, 7 N. W. P. 293; and obstruction of watercourse, *Rajrup Koer* v. *Abdul Hossein*, 6 Cal 394 (P. C); *Subramanya Iyer* v. *Ramachandra Rao*, 1 Mad 335; *Sankaravadivelu pillai* v. *Secretary of State for India*, 28 Mad 72; *Kaseswar*

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Illustrations.

False imprisonment.

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the imprisonment *de die in diem* is a new imprisonment; and therefore the period of limitation commences to run from the last, and not the first day of the imprisonment (*a*).

Trespass.

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though there afterwards arises new and unforeseen damage from the existence of the ditch (*b*).

Nuisance.

(3) But where the defendants (a highway authority) maintained and kept a ditch so as to be a nuisance, it was held that there was a continuing wrongful act in so keeping it, and that the period of limitation did not run from the first making of it (*c*).

ART. 46.—*Disability.*

Where a person is under disability, the statute only runs from the cesser of the disability (*d*). But whenever the statute once begins to run, it continues to do so notwithstanding subsequent disability (*e*).

By disability is meant infancy, lunacy, or idiocy, and formerly coverture; but since the Married Women's Property Act, 1882, was passed, the latter is no longer a disability.

Mukherjee v. *Annoda Prosad*, 22 C. W. N. 666; 41 I. C. 863; infringement of right of ferry, *Nityahari Roy* v. *Dunne*, 18 Cal. 652; also *Goverdhandas* v. *Naraindas*, 1 S. L. R. 238 (on appeal, 3 S. L. R. 228; 6 I. C. 881); nuisance, *Ruknuddin* v. *Altaf Ahmad*, 60 I. C. 519.

(*a*) *Hardy* v. *Ryle*, 39 B. & C. 608.

(*b*) *Kansas Pacific Railway* v *Mihlman*, 17 Kansas Reports, 224; *Lal Singh* v. *Hira Singh*, 3 Lah. L. J. 128; 60 I. C. 20.

(*c*) *Whitehouse* v. *Fellowes*, 10 C. B. (N S.) 765.

(*d*) 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16.

(*e*) *Rhodes* v. *Smithurst*, 4 M. & W. 42; *Lafond* v. *Ruddock*, 13 C. B 819. See Indian Limitation Act, ss. 6 and 7.

SECTION II.—PUBLIC AUTHORITIES PROTECTION ACT, 1893.

ART. 47.—*Special limitation in favour of Public Officers and Authorities.*

No action lies against any person :

(a) For any act done in pursuance or execution, or intended execution, of any Act of Parliament or of any public duty or authority, or

(b) In respect of any neglect or default in the execution of any Act of Parliament, duty or authority,

unless it be commenced within **six months** next after the act, neglect or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof (*a*).

Indian Law.

The Indian Limitation Act, 1908, provides a period of ninety days for an action for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India (*b*)

Continuance of damage.

The period of six months runs from the act, neglect or default complained of: *or* "in case of a **continuance of injury or damage,**" from the ceasing thereof. These words have been held to apply not to cases where damage inflicted once and for all continues unrepaired, but to cases where there is a new damage recurring day by day in respect of an act done, it may be once and for all at some prior time repeated, or it may be from day to day. For instance, where a local authority discharges sewage day by day into a private lake, that is a "continuance of injury or damage" in respect of which an action lies, although it may have *begun* more than six months before action brought (*c*).

(*a*) 56 & 57 Vict. c. 61. The Act applies to servants of the Crown, and is not impliedly repealed by s. 8 of the Maritime Conventions Act, 1911 ; *The Danube II.*, [1920] p. 104, affirmed [1921] p. 183.

(*b*) Art. 2.

(*c*) *Harrington* (*Earl of*) v. *Derby Corporation*, [1905] 1 Ch. 205, 225.

Art. 47.

Illustrations.

(1) A magistrate having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment of the fine, and a distress was put in on the plaintiff's premises. Subsequently the conviction was quashed for want of jurisdiction. The plaintiff has six months *from the date of the wrongful entry* on his premises within which to bring his action for the illegal distress. The wrongful entry, not the order of the magistrate, by authority of which it was made, was "the act complained of" (*a*)

(2) A municipal corporation acquired and worked tramways under their statutory powers. An action for damages for injuries sustained by a passenger on one of their tramcars in consequence of the negligence of their servants must be begun within six months of the negligence complained of (*b*).

Contractor under public authority.

(3) But though the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate, it does not extend to an independent contractor doing work under contract with a public authority for his own profit. So a contractor laying down tram lines under contract with the London County Council (though the county council would be protected) cannot claim the protection of the Act (*c*). And the Act has been held not to apply to ordinary contracts with a public authority (*d*).

(4) An action was brought against a district board having the control and management of a hospital, for negligence of a nurse, whereby a patient lost his life through being given an overdose of opium. The action was brought by the widow of the patient under Lord Campbell's Act. Under that Act the action must be brought within one year of the death. But it was held that the Public Authorities Protection Act applied, and as the action was not brought within six months of the negligence complained of it was too late (*e*).

(*a*) *Polley* v. *Fordham*, [1904] 2 K. B. 345.

(*b*) *Lyles* v. *Southend Corporation*, [1905] 2 K. B. 1 [C. A.]

(*c*) *Tilling* v. *Dick, Kerr & Co.*, [1905] 1 K. B. 562; *Bradford Corporation* v. *Myers*, [1916] A. C. 242.

(*d*) *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch 449; and see *Clayton* v. *Pontypridd U. D. C.*, [1918] 1 K. B. 219; as to mandamus proceedings, see *R.* v. *Port of London Authority*, [1919] 1 K. B. 176.

(*e*) *Markey* v. *Tolworth Joint Isolation Hospital Board*, [1900] 2 Q. B. 454; and see *Williams* v. *Mersey Docks* and *Harbour Board*, [1905] 1 K. B. 804 [C. A.].

PART II.

RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

OF DEFAMATION.

ART. 48.—*Definitions.*

(1) **Defamation** is the publication concerning a person of a statement in words, writing, by pictures or significant gestures, which exposes such person to feelings of hatred, ridicule, or contempt, whereby he suffers injury to his reputation (not to his self-esteem).

(2) A **libel** for which an action will lie is a statement **in writing** (or in print or in the form of a picture, or caricature) published without lawful justification or excuse calculated to convey to those to whom it is published an imputation on the plaintiff injurious to him in his trade or holding him up to hatred, contempt or ridicule (*a*).

(3) **Slander** is an **oral** statement published without lawful justification or excuse calculated to convey to those to whom it is published an imputation on the plaintiff injurious to him in his trade or holding him up to hatred, contempt, or ridicule.

No action will lie for **slander** unless either (a) the plaintiff prove **special damage,** or (b) the slander is calculated to convey an imputation of one of the kinds enumerated in Art. 50.

(*a*) *Per* Lord BLACKBURN, *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, at p. 771.

Art. 48

The three elements necessary to constitute actionable libel are—

(1) that the words, etc., complained of are defamatory ;

(2) that they refer to the plaintiff ;

(3) that they were published by the defendant.

Analysis of slander.

If the action is for **slander**, he must also prove special damage, unless the slander imputes a criminal offence, or reflects on the plaintiff in the way of his trade or profession, etc. See Art. 50, para. 2, *infra* (*a*).

Justification.

By proving these points, however, the plaintiff only establishes a primâ facie case, and in answer to it the defendant is entitled to prove that the publication was **justified**. He may always justify by showing that the statement complained of was **true**. That is always a complete justification. For the law will not allow a man to recover damages in respect of an injury to a character which he either does not or ought not to possess (*b*). The defendant may also prove that the publication was privileged, that is, that the occasion of the publication was such that he was justified in publishing the words whether true or not. See Arts. 56 and 57.

Art. 49.—*What is defamatory.*

(1) Defamatory words or pictures or effigies are such as impute conduct or qualities tending to disparage or degrade the plaintiff (*c*) ; or to expose him to contempt, ridicule, or public hatred ; or to prejudice him in the way of his office, profession, or trade (*d*).

Provided that words published of a corporation are not actionable without proof of special damage if they refer only to personal character or reputation ; but words calculated to affect a

(*a*) *Jones* v. *Jones*, [1916] 2 A. C. 481, at p. 501.

(*b*) *M'Pherson* v. *Daniels*, 10 B. & C. 272 ; *Wakley* v. *Cooke*, 4 Ex. 511.

(*c*) *Digby* v. *Thompson*, 4 B. & Ad. 821.

(*d*) *Miller* v. *David*, L. R. 9 C. P. 118.

corporation in its property or business may be actionable without proof of special damage (*a*). Art. 49.

(2) It is for the court to say whether the words complained of are capable of bearing a defamatory meaning, and for the jury to say whether they in fact bear that meaning (*b*).

(3) The words used must (if nothing is alleged to give them an extended sense) be construed in the sense in which they would be understood by ordinary persons. If they are not capable of a defamatory meaning in that sense, they may nevertheless be actionable if it is proved that they would be defamatory in the sense in which they would be understood by the persons to whom they were published (*c*).

(4) It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words he used were calculated to convey a disparaging imputation (*d*).

Innuendo.

Words which are not defamatory in their ordinary sense may, nevertheless, convey a defamatory meaning owing to the circumstances in which they are spoken. If I say of a man "he is no better than his father," these words are not in their ordinary sense capable of a defamatory meaning. But if the father is known by the persons to whom the words are used to have been a scoundrel, the words used would convey to them the meaning that the son also is a scoundrel. The words then would be defamatory

(*a*) *South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133; *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

(*b*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741. *Naganatha Sastri* v. *Subramania Iyer*, 32 M. L. J. 392; 40 I. C. 126.

(*c*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

(*d*) *Per* Lord BLACKBURN in *Capital and Counties Bank* v. *H* 7 App. Cas 741, at p. 672; *per* Lord LOREBURN in *E. Hultor* v. *Jones*, [1910] A. C. 20, at p. 23; *Providence* v. *Christens* Bur. L. T. 155; 24 I. C. 769.

Art. 19. in the sense in which they were understood by the persons to whom they were addressed.

As Lord BLACKBURN says: "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances" (*a*).

Accordingly, to make out a case when **words not defamatory in their ordinary sense** have been used, the plaintiff must allege and prove an **innuendo**, *i.e.*, he must allege and prove what the words meant to the persons to whom they were used. So in the illustration we have taken, he would allege that the words used meant "that the plaintiff was a scoundrel." He will prove this meaning by showing by evidence that the father was a scoundrel, and that the person using the words and the person to whom they were addressed knew that the father was a scoundrel.

Hence the rule that **whenever the words are not defamatory in their ordinary sense, the plaintiff must allege in his statement of claim an innuendo, and must prove the facts necessary to satisfy the jury that the meaning alleged in the innuendo was the meaning of the words.** But when words are **defamatory in their ordinary** sense, **no innuendo is necessary.** It is for the court to say whether, taking into account the manner and occasion of the publication and all the circumstances, the words are capable of bearing the meaning alleged in the innuendo, and for the jury to say whether in fact they bore that meaning.

In *Shepherd* v. *Trustees of the Port of Bombay*, GREEN, J., laid down that in India it was for the judge to determine from the plain and ordinary meaning of the words used whether they were libellous or not, and that "it is for the plaintiff in a suit for libel to establish that the words in question did in fact mean what he alleged, and not merely that they were capable of bearing such meaning . . . and in the case of libel or slander couched in ordinary English words, not words of art or slang, it is not admissible to ask witnesses in what sense they understood them" (*b*).

(*a*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 771.
(*b*) 1 Bom. 477.

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So, where in a suit for damages for defamation the plaintiffs alleged that the words used were capable of being understood to imply that the plaintiff was an outcaste, the court said: "Words, therefore, which are intended to bring about disastrous consequences resulting from the loss of caste, such as deprivation of religious and social communion, by importing unworthiness to any person to continue a member of his caste, are primâ facie defamatory to give rise to a cause of action. They certainly may lower him in the estimation of his own caste and of other castes. *Prayaschittam* by itself may not indicate any kind of excommunication. But *Prayaschittam* for a caste offence as a condition for readmission into religious or social communion certainly implies provisional excommunication, which is removed when *Prayaschittam* is performed. Where the meaning of the imputation is ambiguous, evidence is admissible to explain its meaning. . . . The words complained of are capable of being understood to imply that the plaintiff was an outcaste, and as it is open to the plaintiff to prove that words were, in fact, intended to convey that imputation having regard to the time and place and manner of utterance, and all other relevant facts which may be duly proved, we are of opinion that the plaint discloses a cause of action" (*a*).

Illustrations of words defamatory in their ordinary sense.

(1) Thus, describing another as an infernal villain or an insolent upstart is a disparaging statement sufficient to sustain an action (*b*); and so is an imputation of insanity (*c*); or insolvency, or impecuniousness (*d*); or even of past impecuniousness (*e*); or of gross misconduct (*f*); or of turf-trickery (*g*); or of ingratitude (*h*); or of witchcraft and sorcery (*i*); or of being of low caste (*j*) and unworthiness to be a caste member (*k*).

(*a*) *Cuppusami Chetty* v. *Doraisami Chetty*, 33 Mad. 67; *Vengala Venkayya* v. *Venkataramiah*, 28 M. L. J. 58; 26 I. C. 460.

(*b*) *Bell* v. *Stone*, 1 Bos. & P. 331; *Brijnath* v. *F. M. Byrne* 9 A. L. J. 253; 13 I. C. 506.

(*c*) *Morgan* v. *Lingen*, 8 L. T. 800.

(*d*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J. Ex. 201; *Eaton* v. *Johns*, 1 Dowl. (N.S.) 602.

(*e*) *Cox* v. *Lee*, L. R. 4 Ex. 284.

(*f*) *Clement* v. *Chivis*, 9 B. & C. 172.

(*g*) *Greville* v *Chapman*, 5 Q. B. 731, at p. 744.

(*h*) *Cox* v. *Lee*, L. R. 4 Ex. 284.

(*i*) *Shoobhagee Koeri* v. *Bokhori Ram*, 4 C. L. J. 390.

(*j*) *Sant* v. *Bhaghal*, 140 P. R. 1882.

(*k*) *Cuppusami Chetty* v. *Doraisami Chetty*, *supra*.

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(2) So, reflections on the professional and commercial conduct of another are defamatory; as, for instance, to say of a physician that he is a quack. So, also, calling a newspaper proprietor "a libellous journalist" or to say that the picture advertised as Ravivarma's is not really so (*a*) or describing the journalist's communication as rubbish (*b*) is defamatory (*c*). But applying the word "Ananias" to a newspaper does not necessarily impute wilful and deliberate falsehood to its manager and proprietor (*d*). To call an Anglo-Indian a 'native' is not defamatory, though it may be a gross abuse (*e*); mere entry of a person's name in the surveillance register is not defamatory (*f*).

Words defamatory by innuendo.

(3) Inserting the plaintiff's names under the head of "first meetings under the Bankruptcy Act" is libellous, the innuendo being that the plaintiffs had become bankrupt, or taken proceedings in liquidation (*g*). So the insertion of the plaintiff's name in a list of persons against whom decrees in absence had been obtained in the Small Debts Court is libellous, the innuendo being the plaintiff's refusal or delay to pay his debts (*h*). The publication in a newspaper of a story of no literary merit as being that of a well-known author has been held libellous (*i*).

Words not defamatory in their ordinary sense.

(4) When a firm of brewers sent out to their customers a circular in the following terms: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank," it was held that (1) the words were not libellous in their natural meaning, and (2) there were no facts proved which made them capable of bearing the meaning alleged in the innuendo to the effect that the plaintiffs were insolvent. Accordingly, the circular was not actionable although its effect had been to cause a run on the bank and loss to the plaintiffs (*j*).

(*a*) *Narasinga v. Kasturiranga Vengar*, 9 M. L. T. 230; 9 I. C. 279.
(*b*) *Christensen* v. *Castor*, 41 I. C. 696.
(*c*) *Wakley* v. *Cooke*, 4 Ex. 518.
(*d*) *Australian Newspaper Co* v. *Bennett*, [1894] A. C. 284.
(*e*) *Christensen* v. *Castor*, 41 I. C. 696.
(*f*) *Rawlins* v. *Anant Lal*, 2 Pat. L. T. 175; 59 I. C 905.
(*g*) *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502.
(*h*) *Stubbs Limited* v. *Mazure*, [1920] A. C. 66, and compare this with *Stubbs Limited* v. *Russel*, [1913] A. C. 386.
(*i*) *Ridge* v. *The English Illustrated Magazine Ld*, 2*a* T. L. R. 592.
(*j*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

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(5) And in a later case it was held that a circular sent out by an insurance company for which the plaintiff had acted as agent, to the effect that the agency of the plaintiff had "been closed by the directors," was incapable of meaning that the plaintiff had been dismissed for some reason discreditable to him (as alleged in the innuendo), although some persons might choose to draw this inference, not from the language used, but from the fact referred to (*a*).

Corporations.

(6) It is actionable without special damage to say of a colliery company that the cottages let by the proprietors to their workmen are in an insanitary condition, for such an imputation is likely to injure its reputation in the way of its business (*b*). But inasmuch as a corporation, as distinguished from the individuals composing it, cannot be guilty of corrupt practices, it is not libellous without proof of special damage to charge a municipal corporation with corrupt practices (*c*).

(7) The exhibition of the waxen effigy of a person who has been tried for a murder and acquitted, in company with the effigies of notorious criminals, may be defamatory (*d*); like-wise the exhibition of a person's effigy calling it by his name and beating it with shoes was held to be defamation of character (*e*).

Art. 50.—*When Special Damage essential to Action for Slander.*

(1) Except in the following cases spoken words are not actionable without proof of special damage, and the damage complained of must be such as might fairly and reasonably have been anticipated from the slander (*f*), *i. e.* not be too remote (*g*).

(*a*) *Nevill* v. *Fine Art and General Insurance Co.*, [1897] A. C. 68.

(*b*) *South Hetton Coal Co., Limited* v. *North Eastern News Association*, [1894] 1 Q. B. 133 [C. A.]

(*c*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94.

(*d*) *Monson* v. *Tussaud's, Limited, Monson* v. *Louis Tussaud*, [1894] 1 Q. B. 672 [C. A.].

(*e*) *Petambar Dos* v. *Dwarka Persad*, 2 N. W. P. 435.

(*f*) *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Jones* v. *Jones*, [1916] 2 A. C. 481.

(*g*) *Speake* v.
[1892] 2 Q. B. 5

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(2) No proof of special damage need be given in the case of words imputing :

(a) A criminal offence punishable by imprisonment (*a*) ;

(b) Some disease tending to exclude the party defamed from society (*b*).

(c) Unchastity in a female (*c*) ;

(d) Unfitness of the plaintiff for his profession or trade, or office of profit (*d*) ;

(e) Dishonesty or malversation in a public office of trust (*e*) ; or

(f) Misconduct in an office of credit or honour such as would be ground for his removal from office (*f*).

This rule of English Common Law that special damage is necessary to support an action for slander, except in certain cases is not applicable in India (*g*).

(*a*) *Webb* v. *Beavan*, 11 Q. B. D. 609 ; *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.

(*b*) *Bloodworth* v. *Gray*, 7 Man. & Gr. 334.

(*c*) Slander of Women Act, 1891. *Mi Ngwe Hmon* v. *Mi Pwa See*, 7 Bur. L. T. 253 ; 27 I C 979 ; *Nga Nyo* v. *Mi Te*, 11 U. B. R 98 ; 33 I. C. 673. See also *Dinshaji* v. *Jehangir*, 24 Bur. L. R. 400 ; 69 I. C. 94.

(*d*) *Foulger* v. *Newcomb*, L. R 2 Ex. 327 ; *Miller* v. *David*, L. R. 9 C. P. 118.

(*e*) *Booth* v. *Arnold*, [1895] 1 Q. B. 571 [C. A] ; cf. *Alexander* v. *Jenkins*, [1892] 1 Q. B 797.

(*f*) *Onslow* v. *Horne*, 2 W. Bl. 750; *Vaidyanatha Sastrigal* v. *Samasundara Tambiran*, 12 M. L. T. 377 ; 24 M. L. J. 8 ; 16 I. C. 736.

(*g*) *Leslie Rogers* v *Hajee Fakir Muhammad Sait*, 42 Mad. 132. According to the High Courts of Bombay, Madras and Allahabad, mere verbal abuse is actionable without proof of actual damage : *Kashiram* v. *Bhadu*, 7 B. H. C. R. 17 ; *Parvathi* v *Mannar*, 8 Mad. 175 ; *Ma Win* v. *Ma Ngon*, 1 Bur. L. J. 148 ; *Abdul Hakim* v. *Tej Chunder*, 3 All 815 ; *Sagar Ram* v. *Badu Ram*, 1 A. L. J. 102. But the High Court of Calcutta holds the contrary view : *Girish Chunder* v. *Jatadhari*, 26 Cal. 653 (but see *Jogeswar Sarma* v. *Dinaram Sarma*, 3 C. L. J. 140).

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Damage must be natural, but not necessarily legal, consequence of slander.

(1) The special damage to support an action for slander must be the **natural and probable consequence** of the defendant's words (*a*), but need **not be their legal consequence,** *i.e.*, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what *ought* to follow (*b*). Special damage resulting from the repetition of an original slander is too remote (*c*) unless the original slander is uttered to many persons and the subsequent loss may reasonably be attributed to this (*d*). But special damage caused by repetition of a slander is not too remote (1) when the original slander is made to a person who has a legal or moral duty to repeat it; (2) when the person repeating the slander is authorised or intended to do (*e*).

The special damage must be some temporal loss.

(2) The special damage must be actual temporal loss (*f*), *i.e.*, loss of something pecuniary or capable of being estimated in money (*g*), mere *risk of loss* is not enough (*h*). Thus actual loss of trade or employment is enough (*i*), as also is actual loss of gratuitous hospitality (*j*), for a dinner has some pecuniary value; but loss of friends or society, pain, illness and suffering, are not enough (*k*). But apparently, if special damage of pecuniary value be shown and the action is therefore maintainable, the damages awarded need not be limited to such special damage but may compensate also for loss to reputation generally (*l*).

(*a*) *Lynch* v *Knight*, 9 H. L. Cas. 577; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407 [C. A.].

(*b*) *Lynch* v. *Knight*, 9 H. L. Cas. 577.

(*c*) *Ward* v. *Weeks*, 7 Bing. 211.

(*d*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524.

(*e*) *Derry* v. *Handley*, 16 L. T. (N. S.) 263.

(*f*) *Per* BOWEN, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524. [C. A.], at p. 532.

(*g*) *Chamberlain* v. *Boyd*, 11 Q. B. D. 407.

(*h*) *Ibid.*, *per* BOWEN, L.J., at p. 416.

(*i*) *Evans* v. *Harries*, 1 H. & N. 251.

(*j*) *Davies* v. *Solomon*, L. R. 7 Q. B. 112.

(*k*) *Moore* v. *Meagher*, 1 Taunt. 39 [Ex. Ch.]; *Roberts* v. *Roberts*, 5 B. & S. 384; *Allsop* v. *Allsop*, 5 H. & N. 534.

(*l*) *Dixon* v. *Smith*, 5 H. & N. 453.

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Damage caused by plaintiff himself.

(3) If the damage be immediately caused by the plaintiff himself, he cannot sue. For instance, where the plaintiff (a young woman) told the slander to her betrothed, who consequently refused to marry her, it was held that no action would lie against the slanderer (*a*).

Imputation of unchastity.

(4) Formerly, words imputing unchastity to a woman were not actionable without proof of special damage except in the city of London. But by the Slander of Women Act, 1891 (*b*), this scandalous state of the law has been altered and it is enacted that words spoken and published which impute unchastity or adultery to any woman or girl, shall not require special damage to render them actionable: provided that the plaintiff shall not recover more costs than damages, unless the judge certifies that there was reasonable cause for bringing the action. The High Court of Calcutta thinks that an imputation of unchastity to a woman is not actionable without proof of special damage within the city of Calcutta, though it may be in the moffusil (*c*).

Examples of damage implied from imputation of crime.

(5) The words, "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable *per se* (*d*). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo "of the murder of D."] are a sufficient charge of murder to support an action without proof of special damage (*e*). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (*f*). Nor are words imputing an impossible crime, as "Thou hast killed my wife," who, to the knowledge of all parties, was alive at the time (*g*).

(*a*) *Speight* v. *Gosnay*, 60 L. J. Q. B. 231 [C. A.].

(*b*) 54 and 55 Vict. c. 51.

(*c*) *Bhooney Money* v. *Natobar Biswas*. 28 Cal. 452; *Girwar Singh* v. *Siraman Singh*, 32 Cal. 1060; *Sukan Teli* v. *Bipal Teli*, 4 C. L. J. 388; but see *Dhirajbala Dasi* v. *Gopal Chandra*, 20 I. C. 768.

(*d*) *Jones* v. *Herne*, 2 Wills. 87.

(*e*) *Oldham* v. *Peake*, W. Bl. 959.

(*f*) *Per* Lord ELLENBOROUGH in *Thompson* v. *Bernard*, 1 Camp. 48; and *per* KENYON, *Christie* v. *Cowell*, Peake, 4.

(*g*) *Snag* v. *Gee*, 4 Co. Rep. 16; *Heming* v. *Power*, 10 M. & W. 564. 569.

Similarly imputations of having committed adultery or tampering with the loyalty of sepoys (being offences under the Indian Penal Code) are actionable *per se* (*a*).

(6 The allegation, too, must be a direct charge of a crime punishable by imprisonment. The crime need not be indictable (*b*), but a charge of having committed a crime punishable by fine only, although it involves a liability to summary arrest, is insufficient, without proof of special damage (*c*). Thus, saying of another that he had forsworn himself is not actionable *per se*, without showing that the words had reference to some judicial inquiry (*d*). But an imputation that the plaintiff had brought a blackmailing action is actionable without proof of special damage, for by inference it imputed to the plaintiff that he was guilty of an indictable offence (*e*).

(7) So words imputing mere suspicion of a crime are not actionable without proof special damage (*f*).

Imputation of unfitness for society.

(8) Again, to allege the *present* possession of an infectious, or even a venereal, disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (*g*).

Imputation of unfitness for business or office of profit.

(9) It is quite clear that, as regards a man's business, or profession, or office, *if it be an office of profit*, the mere imputation of want of ability to discharge the duties of that office, is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct; the probability of pecuniary loss from such imputation obviates the necessity of proving special damage. But the mere disparagement of a tradesman's goods is not sufficient. The disparagement must be of his unfitness for business (*h*), or some allegation which must necessarily

(*a*) *Ratan* v. *Bhaga*, (1896) P. J. 376; *The Englishman* v. *Lala Lajput Rai*, 14 C. W. N. 713; 6 I. C. 81.

(*b*) *Webb* v. *Beavan*, 11 Q. B. D. 609.

(*c*) *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.

(*d*) *Holt* v. *Scholefield*, 6 Term Rep. 691.

(*e*) *Marks* v. *Samuel*, [1904] 2 K. B. 287 [C. A].

(*f*) *Simmons* v. *Mitchell*, 6 App. Cas. 156 [P. C.]. See *South Indian Ry.* v. *Ramakrishna*, 13 Mad. 34 (this decision, it is submitted, must be confined to the facts of the case only).

(*g*) See *Carslake* v. *Mappledoram*, 2 Term Rep. 473; *Bloodworth* v. *Gray*, 7 Man & Gr. 334.

(*h*) See *White* v. *Mellin*, [1895] A. C. 154; *Myroft* v. *Sleight*, 125 L. T. 622.

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injure his business (*a*). Thus, words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable *per se* (*b*). And similarly where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable ; but it is not so if he holds no ecclesiastical office (*c*).

(10) So to say of a surgeon "he is a bad character ; none of the men here will meet him," is actionable (*d*). Or of an attorney that "he deserves to be struck off the roll" (*e*). But without special damage it is not actionable to impute to a solicitor insolvency (*f*), or to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession (*g*). But this seems a curious refinement. A similarly absurd distinction has been taken between saying of a barrister "He hath as much law as a jackanapes" (which is actionable *per se*) and "He hath no more wit than a jackanapes" (which is not actionable). The point being that law is, but wit is not, essential to the profession of a barrister (*h*).

Unfitness for offices of honour and credit.

(11) With regard to slander upon persons holding mere offices of honour, the loss of which would not necessarily involve a pecuniary loss, the mere imputation of want of ability or capacity is not enough. The imputation to be actionable *per se*, must be one which, if true, would show **that the plaintiff ought to be and could be deprived of his office by reason of the incapacity imputed to him.** The implied damage is the risk of loss of the office which he holds. Thus, an imputation of drunkenness against a town councillor is not actionable without proof of special damage. For such conduct, however objectionable, is not such as would enable him to be removed from, or deprived of that

(*a*) See *Royal Baking Powder Co.* v. *Wright, Crossley & Co*, 15 R. P. C. 677.

(*b*) *Irwin* v. *Brandwood*, 2 H. & C. 960.

(*c*) *Gallwey* v. *Marshall*, 23 L. J. Ex 78.

(*d*) *Southee* v. *Denny*, 1 Ex. 196.

(*e*) *Phillips* v. *Jansen*, 2 Esp. 624.

(*f*) *Dauncey* v. *Holloway*, [1901] 2 K. B. 441 [C. A.].

(*g*) See also *Jenner* v. *A' Beckett*, L. R. 7. Q. B. 11 ; and *Miller* v. *David*, L R. 9 C. P. 118.

(*h*) See *per* POLLOCK *arguendo*, *Ayre* v. *Craven*, 2 A & E. 2, at p. 4.

office, nor is it a charge of malversation in his office (*a*). But a charge of **dishonesty in his office**, against one who holds a public office of trust, such as that of an alderman of a borough is actionable without special damage, even although there be no power to remove him (*b*). Art. 50.

ART. 51.—*The Libel or Slander must refer to the Plaintiff.*

The plaintiff must prove that the words complained of might reasonably be understood by the persons to whom they are published to refer to him, and that they were understood to refer to him.

It is no defence that the defendant did not intend to refer to the plaintiff (*c*).

Comment.

It is necessary that the plaintiff should be referred to by name. A person may be libelled under a fictitious name or by mere description. But there must be enough to show ordinary readers that the plaintiff is the person about whom the defamatory words are used. So "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" (*d*).

On the other hand, when the words used are such as to indicate a particular person, he can sue even though the defendant did not know of his existence and did not intend to defame him (*c*).

Illustrations.

(1) So where an article in a newspaper described certain sales of forged antiques as an attempt at deception and extortion, but did not refer to any particular dealer by name or description, it was held that no dealer could sue for libel, as the libel attacked not an individual but a class (*e*). But if the class be limited in number, then each member may be libelled (*f*).

(*a*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797 [C. A.].
(*b*) *Booth* v. *Arnold*, [1895] 1 Q B. 571 [C A.].
(*c*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.
(*d*) *Per* WILLES, J., in *Eastwood* v. *Holmes*, 1 F. & F. 349.
(*e*) *Eastwood* v. *Holmes*, *supra*.
(*f*) *Harrison* v. *Thornborough*, 10 Mad. 196.

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(2) A newspaper published an article describing a motor festival at Dieppe. The article contained the words: "Whist there is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing, etc.," and went on to say that Artemus Jones was a churchwarden when at home, but that when on the French side of the Channel "he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." Neither the writer nor the editor of the paper intended to refer to the plaintiff, a well-known barrister named Artemus Jones. The sketch was a mere fancy sketch of life abroad, and the name "Artemus Jones" was used as a fancy name, describing an imaginary character. It was proved, however, that readers of the paper thought the article referred to Mr. Jones. The judge directed the jury that if persons reading the article might reasonably think it related to the plaintiff, they might find a verdict for him. The jury found for the plaintiff, and the House of Lords held that he was entitled to judgment (*a*).

(3) A suit for defamation can only be maintained by the person actually defamed; but if the person is not *sui juris*, by the guardian or next friend under the provisions of the Civil Procedure Code (*b*). Accordingly when the slander referred to the female relatives, their male relatives could not maintain an action (*c*); nor could the heir of a deceased person for defamatory words spoken of the latter (*d*). The same rule applies to an action by the husband for the defamation of his wife (*e*); but if the imputation made against the wife involves also the slander of the husband, he can maintain an action on his own account (*f*).

(*a*) *E. Hulton & Co.* v. *Jones*, [1910] A. C. 20.

(*b*) *Daya* v. *Param Sukh*, 11 All. 104.

(*c*) *Udai and Others* v. *Bhawani Parsad*, All. H. C. R. (1866) 264; *Subbaiyar* v. *Krishnaiyar and Another*, 1 Mad. 383; *Daya* v. *Param Sukh*, *supra*; *Girwar Singh* v. *Siraman Singh*, 32 Cal. 1060; but see *Q.* v. *Balkrishna*, 17 Bom. 573; *Thakurdas* v. *Adhar Chandra*, 32 Cal. 425 (for a complaint for the offence of defamation).

(*d*) *Luckumsey Rowjee* v. *Hurvan Nursey*, 5 Bom. 580.

(*e*) *Brahmanna* v. *Rama Krishnamma*, 18 Mad. 250; *Shoobhagee Koeri* v. *Bokhori Ram*, 4 C. L J. 390. But the husband can lodge a criminal complaint (*Chotalal Lallubai* v. *Nathabai*, 25 Bom. 151; *Chellam Naidu* v. *Ramasami*, 14 Mad. 379; *Emp.* v. *Anath Gaundan*, 15 M. L. J. 224.

(*f*) *Sukkan Teli* v. *Biped Teli*, 34 Cal. 48.

ART. 52.—*Publication.*

Art. 52.

The making known of a libel or slander **to any person other than the object of it**, is publication in its legal sense, and repetition of defamatory matter is a new publication and a distinct cause of action (*a*).

Publication explained.

(1) "Though, in common parlance, that word [publication] may be confined to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual is indisputably, in law, a publishing" (*b*). Publication, therefore, being a question of law, it is for the jury to find whether the facts by which it is endeavoured to prove publication are true ; but for the court to decide whether those facts constitute a publication in point of law (*c*).

Telegrams and post cards.

(2) If the libel be contained in a telegram (*d*), or be written on a post card (*e*), that is publication, even though they be addressed to the party libelled ; because the telegram must be read by the transmitting and receiving officials, and the post card will in all probability be read by some person in the course of transmission (*f*), unless the statement on the post card is of such a nature that it would not be understood as defamatory by persons reading it casually (*g*). So any communications made to the person himself, without the chance of strangers knowing it, would not constitute publication (*h*).

(*a*) *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185.

(*b*) *R.* v. *Burdett*, 4 B. & Ald. 143.

(*c*) *Street* v. *Licensed Victuallers' Society*, 22 W. R. 553 ; *Hart* v. *Wall*, 2 C. P. D. 146.

(*d*) *Robinson* v. *Jones*, 4 L. R. Ir. 391.

(*e*) *Whitfield* v. *S. E. Ry.*, (1858) E. & B. 115.

(*f*) *Williamson v. Freer*, L. R. 9 C. P. 393.

(*g*) *Sadgrove v. Hole*, [1901] 2 K. B. 1.

(*h*) *Mahomed Ismail Khan* v. *Mahomed Jabir*, 6 N. W. P. 38 ; *Kamal Chandra Basu* v. *Nobin Chandra Ghosh*, 10 W. R. 184 ; *Q.* v. *Taki Hussani*, 7 All. 205 (F. B.) ; *Biswas Nath* v. *Keshab*, 7 C. W. N. 74 ; *Q.* v. *Atmaram*, 18 Bom. 207.

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Dictating libel.

(3) So, dictating a libellous letter to a typewriter, and giving it to an office boy to make a press copy (*a*), the preparation of copies of minutes of proceedings by clerks, (*b*), or the presentation in court of a petition (*c*) containing defamatory matter, have been held to be publication.

Husband and wife.

(4) The communication of a libel *by the writer to his own wife* is not "publication" because, in the eye of the law, husband and wife are one person (*d*).

But communication to *the wife of the person defamed* is "publication". Obviously, a man may suffer grievously if imputations on his character are made to his wife (*e*).

ART. 53.—*Repeating Libel or Slander.*

(1) An action will lie for slander or libel against a defendant who is merely a repeater, printer, or publisher of it (*f*), unless the defendant can show: (i) That he did not know that he was publishing a libel or slander; (ii) That his ignorance was not due to any negligence on his part; (iii) That in the case of libels he did not know, and had no grounds for thinking, the

(*a*) *Pullman* v. *Hill & Co*, [1891] 1 Q. B. 524 (unless the circumstances are such that the occasion is privileged); see *Edmondson* v. *Birch*, [1907] 1 K. B. 371; *Roff* v. *British and French Chemical Mg. Co*, [1918] 2 K. B. 677; *Vaidyanatha Sastrigal* v. *Somasundara Tambiran*, 12 M. L. T. 377; 16 I C. 736; *Govindanair v. Atchuta menon*, 39 Mad. 433 (communication to one person is sufficient).

(*b*) *Shepherd* v. *Trustees of the Port of Bombay*, 1 Bom. 477.

(*c*) *Abdul Hakum* v. *Tej Chunder*, 3 All. 815; *Green v. Bellaney*, 14 W. R. 27.

(*d*) *Wennhak* v. *Morgan*, 20 Q. B. D. 635.

(*e*) *Wenman* v. *Ash*, 13 C. B. 836; *Shoobhagee Koeri* v. *Bokhori Ram*, *supra*.

(*f*) *McPherson* v. *Daniels*, 10 B. & C. 263; *Watkin* v. *Hall*, L. R. 3 Q. B. 396; *Kai Khusru Naoroji Kabraji* v. *Jehangir Byramji Murgbar*, 14 Bom. 532; *In re Howard*, 12 Bom. 167.

document was likely to contain libellous matter (*a*). Art. 53.

(2) But in slander, if the special damage arise simply from the repetition, the originator will not be liable (*b*); except (a) where the originator has authorised the repetition (*c*); or (b) where the words are originally spoken to a person who is under a moral obligation to communicate them to a third person (*d*).

Examples.

(1) But where A. slandered B. in C.'s hearing, and C., without authority, repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorised repetition and not of the original statement (*e*). But if a defamatory letter meant for X is opened and read by Y., the writer of such letter is not liable if in the circumstances he had no reason to expect Y. would so act, as he has made no publication of his letter to Y. (*f*).

Printing slander.

(2) So the printing and publishing by a third party of oral slander (not *per se* actionable) renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action for libel, although the originator, who merely *spoke* the slander, will not be liable (*g*).

Duty to repeat.

(3) In *Derry* v. *Handley* (*d*), COCKBURN, C.J., observed: "Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person (as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters), the slanderer cannot excuse himself by saying, 'True, I

(*a*) *Emmens* v. *Pottle*, 16 Q. B. D. 354; *Vizetelley* v. *Mudie's Select Library*, [1900] 2 Q. B. 170, *Weldon* v. *Times Book Co.*, 28 T. L. R. 143.

(*b*) *Parkins* v. *Scott*, 1 H. & C. 153.

(*c*) *Kendillon* v. *Maltby*, Car. & M. 402.

(*d*) *Derry* v. *Handley*, 16 L. T. (N.S.) 263.

(*e*) *Ward* v. *Weeks*, 4 Moo. & P. 808.

(*f*) *Powell* v. *Gelston*, [1916] 2 K. B. 615.

(*g*) *McGregor* v. *Thwaites*, 3 B. & C. 24.

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told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

Publisher of libel.

(4) Upon this principle the publisher, as well as the author of a libel, is liable and the former cannot exornerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (*a*).

Libels in newspapers.

(5) When a libel is published in a newspaper the original composer is liable, for not only does he publish it to the editor and compositors, but he is a participator in the publication to the public. The proprietor who publishes the newspaper by his servants is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. The editor also is usually responsible for the publication (*b*). And of course the same principle applies to libels in magazines and books.

Innocent disseminators.

(6) A more difficult question arises with regard to the dissemination of newspapers and books by newsvendors, booksellers, and lending libraries. Primâ facie all these persons take part in publishing libels contained in the papers or books they sell. But a person who merely disseminates a newspaper or book which contains a libel is executed if he can satisfy the jury (i) that he **did not know** the newspaper or book **contained** a libel; and (ii) that his ignorance was **not due to any negligence** on his part; and (iii) that he **did not know**, and had no grounds for thinking, the book or newspaper was **likely to contain libellous matter**. If he can prove these facts he is not responsible as a publisher of the libel; otherwise he is (*c*).

(*a*) *Per* BEST, J., *De Crespigny* v. *Wellesley*, 5 Bing. 403; *Q.* v. *Janardan Damodar Dikshit*, 19 Bom 703; *Q.* v. *McLeod*, 3 All. 342.

(*b*) *Per* Lord ESHER in *Emmens* v. *Pottle*, 16 Q. B. D. 354, 357.

(*c*) *Emmens* v. *Pottle*, 16 Q. B. D. 354; *Vizetelli* v. *Mudie's Select Library*, [1900] 2 Q. B. 170.

ART. 54.—*Justification.*

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That the statements complained of as defamatory are true in fact is an absolute defence in an action of defamation (*a*).

Proof of justification.

(1) The burden of proving a defence of justification lies on the defendant; and if justification be set up it must be strictly proved, and it is not enough to say that the statements are partly or in the main true. The plaintiff must prove that the facts alleged in justification are at any rate substantially true in every material particular. Nor is it enough to show that the plaintiff had a general reputation for the misconduct alleged. It must be proved that in fact he was guilty of the misconduct (*b*).

Explanation of justification.

(2) LITTLEDALE, J., thus explains the principle of the defence of justification: "If the defendant relies upon the truth as an answer to the action, he must plead that matter specially; not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess" (*c*).

ART. 55.—*Fair Comment.*

(1) No action will lie if the defendant can prove that the words complained of are a fair and bonâ fide comment on a matter of public interest.

(2) The court decides (i) whether the matter commented on is one of public interest; (ii) whether there is evidence that any part of

(*a*) But *cf.* Indian Penal Code, s. 499; exception (1), "It is not defamation to impute anything which is true concerning any person, *if it be for the public good that the imputation should be made or published.*"

(*b*) *Wood* v. *Durham*, 21 Q. B. D. 501; *Altaf Hussain* v. *Tasadaq Hussain*, All. H. C. R. (1867) 87; *Dharma Das Khundu* v. *Kailas Kamini Dati*, 12 W. R. 372; *Ameeruddin Ahmed* v. *Khairunissa* 20 W. R. 60.

(*c*) See *M'Pherson* v. *Daniels*, 10 B. & C. 263, at p. 272.

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the words complained of go beyond the limits of fair comment.

(3) The jury, if the court is of opinion that there is some evidence that the comment is not fair, finds whether it is so or not.

(4) Matters of public interest include (*inter alia*) literary and dramatic works, political matters, and the public conduct of public men, but not their private conduct (*a*).

Fair comment not justification.

(1) The defence of fair comment must not be confounded with justification on the one hand, or privilege on the other. If a defendant justifies, he must prove that the *facts* stated in the libel are substantially true. If he succeeds, he makes out his defence; if he fails, he may, nevertheless, successfully contend that the statements are in the nature of comment on a matter of public interest (*b*).

Literary criticism.

(2) If the alleged libel is a criticism of some such matter of public interest, as a literary or dramatic work, and the statements are in the nature of comment, the defendant need not make out that they are just; it is enough if he can satisfy the jury that they are fair and honest. Thus, if a critic states of a play that it is "dull, vulgar and degraded," and relies on the defence of fair comment, he will succeed if this is an expression of honest opinion, even though the comment be not such as a jury might think a just or reasonable appreciation of the play (*c*).

But the expressions used must not pass the limits of criticism. Facts are not comment; and if facts are misstated, the defence of fair comment is of no avail, as when in criticising a play, the critic stated it was founded on adultery, when in fact there was no incident of adultery in it. This cannot be "comment," fair or otherwise (*d*).

(*a*) *Wisdom* v. *Brown*, 1 T. L. R. 412; *Pankhurst* v. *Hamilton*, 3 T. L. R. 500.

(*b*) *Digby* v. *Financial News*, [1907] 1 K. B. 507; *Peter Walker & Sons Ltd.* v. *Hodgson*, [1909] 1 K. B. 256; *Wootton* v. *Sievier*, [1913] 3 K. B. 499.

(*c*) *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100.

(*d*) *Merivale* v. *Carson*, 20 Q. B. D. 275; *Hunt* v. *Star Newspaper* Co., [1908] 2 K. B. 320; *Adam* v. *Ward*, [1917] A. C. 309; *London Assn.* v. *Greenlands*, [1916] 2 A. C. 15. *Barrow* v. *Hem Chandra Lahiri*, 35 Cal. 495.

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So, too, criticism of a literary work must not be used as a cloak for mere invective or personal imputations not arising out of the subject-matter or based on fact. Statements of this kind are not comment on a literary work, and are libellous if they are defamatory and not true (*a*).

Under these principles, not only books and works of art, but even tradesmen's advertisements, may be fairly criticised (*b*).

The right of fair comment involves two essentials: first, that the imputation should be comment on the work criticised; and second, that it should be "fair"; that is to say, if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. Good faith requires not logical infallibility but due care and attention. . . . An imputation on an author made by a critic, without reference, express or implied, to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him, apart from what appears in his work, cannot be justified by the critic, on the ground that his intention was to base his imputation solely on the work reviewed, and that he had in his mind passages therein supporting the imputation. He is bound to express his opinion with due care and caution, and to give the public no ground for supposing that he is speaking of anything but the performance submitted to its judgment (*c*).

Attacks on public men.

(3) When, however, the defence of fair comment is set up to an attack on the **conduct of public men,** the line is drawn more closely. A public man may be attacked in his **public conduct** but **not in his private conduct** (except in so far as it touches on his public conduct), but the comment must contain no mis-statements of fact (*d*). And even in regard to his public conduct, if imputations are made which charge a public man with base and sordid motives or dishonesty in the discharge of his duties, the defence of fair comment will not avail unless it is based upon facts which are truly stated, and the facts warrant the imputation made,

(*a*) *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B. 627.

(*b*) *Paris* v. *Levy*, 30 L. J. C. P. 11.

(*c*) *R.* v. *Abdool Wadood Ahmed*, 31 Bom. 293; *The Madras Times Printing and Publishing Co. Ltd.* v. *C. H. Rogers*, 30 M. L. J. 294; 32 I. C. 408.

(*d*) *Peter Walker & Son* v. *Hodgson*, [1909] 1 K. B. 239; *Ramkrishnapillai* v. *Karunakara Menon*, 21 I. C. 625.

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Fair comment and privilege.

i. e., the inference drawn from the facts is a reasonable inference from those facts (*a*).

(4) On the other hand, fair comment must be distinguished from privilege. If the defence is privilege, and the privilege is established, the plaintiff fails however grossly untrue the libel may be, unless the defendant was actuated by express malice in making it. If (in the case of qualified privilege) there was express malice, the defence of privilege fails. In fair comment no question of malice arises. The only question is, "is the comment fair, or does it exceed the bounds of fair criticism ?" (*b*).

Fair comment is outside the region of libel altogether, whereas a privileged communication is one which is libellous, but for which no action will lie, because it is made in circumstances which make it privileged (*b*).

"Both privilege and fair comment are two aspects of the law of privilege, with this difference, that the former technically so called relates to the special rights of an individual, whereas the latter concerns the common rights of every member of the public at large" (*c*).

ART. 56.—*Absolute Privilege.*

No action lies for a statement made upon an occasion which is absolutely privileged, although made maliciously. Judicial, Parliamentary and State proceedings are occasions of absolute privilege.

CHANNELL, J. (*d*), thus explains the nature of the absolute privilege in judicial proceedings. "There is no

(*a*) *Campbell* v. *Spottiswoode* 3 B. & S. 769 ; *Hunt* v. *Star Newspaper Co*, [1908] 2 K. B. 309 ; *Dakhyl* v. *Labouchere*, [1908] 2 K. B. 325 ; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292 ; *Digby* v. *Financial News*, [1907] 1 K. B. 502 ; *Lala Lajpat Rai* v. *Englishman*, 36 Cal. 883 (on appeal, 6 I. C. 81 ; 37 Cal. 574). *Surajmal* v B C *Horniman*, 20 Bom. L. R. 185 ; 47 I. C. 449 ; *Nadir Shaw* v. *Piroj Shaw*, 15 Bom. L. R. 130 ; 19 I. C. 98 ; *W. S. Irwin* v. *D. J. Reid*, 48 Cal. 304.

(*b*) See *per* BLACKBURN, J., in *Campbell* v, *Spottiswoode*, 3 B. & S. 769 ; *Merrivale* v. *Carson*, 20 Q. B. D. 275.

(*c*) *Nadirshaw* v. *Pirojshaw*, 15 Bom. L. R. 130 ; 19 I. C. 98 ; *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100.

(*d*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584.

private right of a judge or a witness or an advocate to be malicious. It would be wrong of him, and *if it could be proved*, I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege,' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and to secure their independence that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."

Absolute privilege. Parliamentary proceedings.

(1) Speeches in Parliament are absolutely and irrebuttably privileged (*a*); and a faithful report in a public newspaper of a debate of either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*b*). Statements of witnesses before Parliamentary Committees are also privileged (*c*). Reports, papers, votes and proceedings published by order of either House of Parliament, are absolutely privileged (*d*).

Judicial proceedings and matters of State.

(2) Communications made by order of a Sovereign are absolutely privileged (*e*). Communications relating to affairs of State made by one officer of State to another in the course of duty are also absolutely privileged (*f*). All judges, inferior as well as superior, are privileged

(*a*) *Stockdale* v. *Hansard*, 9 A. & E. 1; *Dillon* v. *Balfour*, 20 L. R. Ir 601.

(*b*) *Wason* v. *Walter*, L. R. 4 Q. B. 73. See *Lala Lajpat Rai* v. *Englishman*, *supra* (where it was said that "it would be a wide extension of this privilege to hold it to cover any independent statement of facts drawn from 'Hansard' or any other report of the proceedings in Parliament").

(*c*) *Goffin* v *Donnelly*, 6 Q. B. D. 307.

(*d*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), ss. 1, 2.

(*e*) *Govinda Nair* v. *Atchuta Menon*, 39 Mad. 433; *Ross* v. *Secretary of State*, 37 Mad. 55, on appeal from 27 M. L. J. 280.

(*f*) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189.

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for words spoken in the course of a judicial proceeding, although they are spoken falsely and maliciously, and without reasonable or probable cause (*a*); and so are counsel, for words spoken with reference to and in the course of a judicial inquiry, although the words are irrelevant to any issue before the tribunal (*b*). Solicitors acting as advocates have a like privilege (*c*). The report of an Official Receiver made to the court in the winding up of a company is privileged on the same ground, as also is the anual report of the Inspector-General in Bankruptcy to the Board of Trade (*d*).

(4) Statements of witnesses made in the course of proceedings in a court of justice, or in any authorised tribunal acting judicially or for the purpose of preparing proofs for use in such proceedings (*e*), can never be the subject of an action (*f*); and a military man giving evidence before a military court of inquiry which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a court of justice (*g*). So also is a person who fills in a form required for obtaining a lunacy order (*h*).

The Privy Council enunciated the principle of the absolute immunity of witnesses in respect of evidence given by them in a judicial proceeding: "It concerns the public and the administration of justice that witnesses giving evidence on oath in a court of justice should not have before their eyes

(*a*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Law* v. *Llewellyn*, [1906] 1. K. B. 487; *Raman Nayar* v. *Subramanya*, 17 Mad. 87.

(*b*) *Munster* v. *Lamb*, 11 Q. B. D. 588; *Sullivan* v. *Norton*, 10 Mad. 28 (F. B.); *Baishanker* v. *Wadia*, 2 Bom. L. R. 3 (F. B.); *Q.* v. *Chrestien*, 2 N. W. P. 473; *Q.* v. *Nagarji Trikamji*, 19 Bom. 340; *Q.* v. *Purushotamdas*, 9 Bom. L. R. 1287; *Upendranath* v. *F. A. Savi*, 36 Cal. 375; *C. H. Crowdy* v. *L. O' Reilly*, 18 I. C. 737; *Nikunja* v. *Harendra*, 20 I. C. 1008; *Shiva Kumari Debi* v. *Becharam Lahiri*, 25 C. W. N. 835; *Jagat Mohan* v. *Kalipada Ghosh*, 1 Pat. 371.

(*c*) *Munster* v. *Lamb*, *supra*; *Mackay* v. *Ford*, 29 L. J. Ex. 404.

(*d*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584; *Burr* v. *Smith* [1909] 2 K. B. 306.

(*e*) *Watson* v. *M'Ewan*, [1905] A. C. 480; *Beresford* v. *White*, 30 T. L. R. 591 [C. A.].

(*f*) *Seaman* v. *Netherclift*, 2 C. P. D. 53; *Barratt* v. *Kearns*, [1905] 1 K. B. 504.

(*g*) *Dawkins* v. *Rokeby*, L. R. 7 H. L. 744.

(*h*) *Hodson* v. *Pare*, [1899] 1 Q. B. 455.

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the fear of being harassed by suits for damages ; but the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury" (*a*). This rule of absolute privilege has been implicitly followed by the Madras and the Bombay High Courts (*b*), but the other courts in India have limited the application to the circumstance of good faith, public good, or relevancy to the inquiry (*c*).

With regard to statements on affidavits in judicial proceedings (*d*) and to statements of parties in their pleadings, the Bombay, the Madras, and the Allahabad High Courts accord an absolute privilege (*e*), but the Calcutta High Court (*f*) places a limitation.

(*a*) *Baboo Ganesh Dutt Singh* v. *Mugneeram*, 11 B. L. R. 321.

(*b*) *Chidambara* v. *Tirumani*, 10 Mad. 87 ; *Manjaya* v. *Sesha Setti*, 11 Mad. 477 ; *Nathji* v. *Labhai*, 14 Bom. 97 ; *Q.* v. *Baboji*, 17 Bom. 127 ; *Q.* v. *Bal Krishna Vithal*, 17 Bom. 573; *In the Matter of Alraja Naidu*, 30 Mad. 222 ; *Q* v. *Govindapillai*, 16 Mad. 235.

(*c*) *Tulsi Ram* v. *Harbans*, 5 A. W. N. 301 ; *Dawan Singh* v. *Mahip Singh* 1 All 425 ; *Emp.* v. *Ganga Prasad* (RICHARDS, J., dissenting), 29 All 685 ; *Bhikumber Singh* v. *Becharam*, 15 Cal. 264 ; *Woolfun Bibi* v. *Jesarat Sheikh*, 27 Cal. 262 ; *Haidar Ali* v. *Abru Mia*, 32 Cal. 756 ; *Girwar Singh* v. *Siraman Singa*, 32 Cal. 1060 ; *Ali Khan* v. *Malik Yuran Khan*, 16 P. R. 1879 ; *Kumdan* v. *Ramji Das*, 146 P. R. 1879 ; *Fateh Mohomed* v. *Emp.*, 34 P. R. 1889 ; *Maya Das* v. *Queen Empress*, 14 P. R. 1893 ; *Miran Shah* v. *Emperor*, 244 P. L. R. 1912 15 I. C. 494 ; *Babu Prasad* v. *Muda Mal*, 18 I. C. 331 ; *Mari Singh* v. *J. Finch*, 18 I. C. 349 ; (where the court held that the English common law doctrine of absolute privilege did not apply to the moffusil). *Mahoomed Sher Ali Khan* v. *Ghasi Ram*, 22 Cr. L. J. 159 ; 59 I. C. 863 ; *Emp.* v. *Chatur Singh*, 43 All. 92.

(*d*) *Adapala Adivaramma* v. *Rubala Rama Chandra*, 6 I. C. 309 ; 21 M. L. J. 85 ; *Giribala Dassi* v. *Pran Krishto Ghosh*, 8 C. W. N. 292 ;

(*e*) *Chunni Lal* v. *Narsing Das*, 40 All. 341 F. B *Adivaramma* v *Ramachandra*, 21 M. L. J. 85 ; 6 I. C. 309 ; *Nathji Muleswar* v. *Lalbhai Ravidat*, 14 Bom. 97 ; *Pachaipermual* v. *Dasi Thangam*, 31 Mad. 400 (notice previous to action held privileged).

(*f*) *Angada Ram Shaha* v. *Nemai Chand Shaha*, 23 Cal. 867 ; *Kalinath Gupta* v. *Govinda Chandra Basu*, 5 C. W. N. 293 ; *Shibnath Talapatro* v. *Sat Kuari Deb*, 3 W. R. 198 ; *Sandyal* v. *Bhaba Sundari*, 15 C. W. N. 995 ; 7 I. C. 803 ; *Dhiro* v. *Govinda*, 65 I. C. 204 ; *Banga Chandra De* v. *Annoda Charan*, 35 C. L. J. 527 ; 69 I. C. 269 ; *Satischandra Chakravarty* v. *Ramdabal De*, 48 Cal. 388. So in Burma, *Maung Myo* v. *Moung Ky Wet*, 3 & B. R. 88, 47 I. C. 674 ; *Lugale* v. *Pothein*, 7 L. B. R. 64 ; 22 I. C. 275 ; *Mang*

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Statements made by an accused person in the ordinary course of his defence are privileged (*a*).

Reports of legal proceedings.

(5) A *fair and accurate report in any newspaper* of proceedings publicly heard before any court exercising judicial authority, is privileged if (i) published contemporaneously with such proceedings, and (ii) not blasphemous or indecent (*b*).

ART. 57.—*Qualified Privilege.*

(1) No action lies for a communication made upon an occasion of **qualified privilege** and fairly warranted by it, unless it be proved to have been made maliciously—i.e., with an improper motive (*c*).

(2) Communications are made upon occasions of qualified privilege if made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where a common interest exists between the person communicating and the person to whom the communication is made (*d*). Such communications, if fairly warranted by any reasonable occasion or exigency and honestly

Lu Gale, Moung Pothein, 6 Bur. L. T. 100; 20 I. C. 290; and in Oudh, *Dalpat* v. *Rai Amarpal*, 21 O. C. 321; 49 I. C. 58.

(*a*) *Pachaipermual Chettyar* v. *Dasi Thangam*, 31 Mad. 400; *In re Payini Chellayya*, 5 M. L. T. 256; 1 I. C. 248; *Padmaraju Pantulu* v. *Venhatramana Iyer*, 19 M. L. J. 217; 11 C. 799. See also *Hayes* v. *Christian*, 15 Mad. 414, and *In the Matter of Alraja Naidu*, 30 Mad. 222; *Golab Jan* v. *Bhola Nath Khettry*, 38 Cal. 880; *Potaraju Venkatareddi* v. *Emp.*, 23 M. L. J. 39; 14 I. C. 659.

(*b*) 51 & 52 Vict. c. 64, s. 3 (Law of Libel Amendment act, 1888). See also *post*, p.

(*c*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341.

(*d*) *Clark* v. *Molyneux*, 3 Q. B. D. 237 at p. 246; *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100; *Adam* v. *Ward*, [1917] A. C. 309.

made, are protected for the common convenience and welfare of society (*a*). Art. 57.

(3) It is the duty of the **judge** to determine **whether an occasion is privileged** or not, and if it is, and there is no evidence of actual malice to go to the jury, he must enter judgment for the defendant (*b*).

(4) It is for the **jury** to find **whether a communication** made upon a privileged occasion **is privileged** or not, *i.e.*, whether the communication is fairly warranted by the occasion and made without actual malice (*c*).

(5) If the occasion is privileged the onus is on the plaintiff to prove malice, i.e., "actual malice" or "malice in fact" (*d*), which means in the given circumstances a wrong motive (*e*)

(6) A communication is made maliciously in fact if made from any indirect and wrong motive such as anger or ill-will, or any unjustifiable intention to inflict injury on the person defamed but if a person make a statement believing it to be true he will not lose the protection of the privileged occasion, although he have no reasonable grounds for his belief; but excess of privilege may be evidence of malice (*f*).

(7) A fair and accurate report in any newspaper of proceedings publicly heard before any

(*a*) See *Toogood* v. *Spyring*, 1 C. M. & R., p. 193; *Macintosh* v. *Dun*, [1908] A. C. 390, 398; *Kishen Lal* v. *Moosi Raza*, 72 I. C. 57.

(*b*) *Clark* v. *Molyneux*, 3 Q. B. D., at p. 246.

(*c*) *Cooke* v. *Wildes*, 5 E. & B. 328; and *per* LOPES, L. J., in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 529.

(*d*) *Clark* v. *Molyneux*, 3 Q. B. D 237 *Jenoure* v. *Delmege*, [1891] A. C. 73.

(*e*) *Nevill* v. *Fine Arts Insurance Co.* [1895] 2 Q. B. 177.

(*f*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; *Royal Aquarium Society* v. *Daubinsan*, [1892] 1 Q. B. 434.

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court exercising judicial authority is privileged if (i) published contemporaneously with such proceedings, and (ii) not blasphemous or indecent (*a*).

(1) This privilege is not excluded because the court lacks jurisdiction (*b*). But if the court itself prohibits publication of its proceedings no privilege is given to a violation of the prohibition (*c*).

(2) LORD BLACKBURN thus explains the nature of qualified privilege and malice: "A publication calculated to convey an actionable imputation is primâ facie a libel, the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a **duty**, though perhaps only of imperfect obligation, or a **right** to make the publication, it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it so long as he is acting in compliance with that duty or exercising that right, and the burden of proof is on those who allege he was not so acting" (*d*).

Meaning of malice.

(3) "If," says BRETT, L.J., in *Clark* v. *Molyneux*, (*e*), "the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. . . . Malice does not mean malice in law, a term of pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further.

(*a*) Law of Libel Amendment Act, 1888, s. 3.

(*b*) *Kimber* v. *Press Association*, [1893] 1 Q. B. 65.

(*c*) Odgers on Libel, 5th Ed., 314.

(*d*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 787.

(*e*) 3 Q. B. D. 237, 246. Every person has the privilege to defend his character against false charges, and in repelling such charges he may retort his assailants (*Amritanath Mitter* v. *Abhoy Charan Ghose*, 32 Cal. 318).

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Everybody assumes thenceforth that he was malicious, that he did do a wrong thing from some wrong motive. So, if it be proved that out of anger or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive." When an imputation is made with the knowledge that it is false, there is an end of the privilege (*a*).

(4) In *Keshav Lal* v. *Bai Grija* (*b*), RANADE, J., said "Under certain circumstances communication of defamatory imputations, even when the justification of truth is not pleaded or established, may be protected, either absolutely in the public interest, or in a qualified way by the occasion, the relations of duty between the parties, and the manner and circumstances under which the communication was made. The cases of absolute privilege are protected in all circumstances, independently of the presence of good or bad faith. In respect of qualified privilege, it is only protected when the occasion is lawful, and is limited by the necessities of the case, if good faith is proved, but not where express malice is proved. . . . If the parties have a duty in the matter, the occasion is lawful, and when such occasion is lawful, and the right is properly exercised, it is not for the defendant to prove good faith, but for the complainant to establish positive malice. . . . Where the caste exercises jurisdiction on a subject which interests its members, it is enough if it proceeds according to caste usage, and exercises its powers with due care and in accordance with custom. It must be ready to give opportunity to the person complained of for explanation. It must act bonâ fide and not be influenced by malice." Also where the plaintiff had given the widest currency to a statement reflecting on X., a servant of the Crown. The defendant, who was Secretary to the Department to which X. belonged sent to the Press for publication a letter containing defamatory statements about the plaintiff,

(*a*) *Venkata Narasimha* v. *Kotayya*, 12 Mad 374; *Vaidyanatha Sastrijal* v. *Somasundara Tambiran*, *supra*.

(*b*) 24 Bom. 13. See also *Vallabha* v. *Madhusudan*, 12 Mad. 495; *Alitram* v. *Hargovan*, 6 Bom. L. R. 684; *Sant* v. *Bhaghal*, 140 P. R. 1832; *Govinda Dass* v. *Bishambar Dass*; 39 All. 561; 44 I. A. 192, on appeal from 23 I. C. 301.

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refuting the latter's statements and vindicating X. It was held that the defendant's statement was made on a privileged occasion, and that in the circumstances the publication was not unreasonably wide and so the privilege was not lost (*a*).

Social and moral duty.

(5) In *Stuart* v. *Bell* (*b*), the plaintiff was a valet, and whilst he and his master were staying at Newcastle as the guests of the defendant, who was a magistrate and mayor of Newcastle, the chief constable showed the defendant a letter which he had received from the Edinburgh police stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh which he had recently left, and suggesting a cautious inquiry. The defendant, without making any inquiry, told the plaintiff's master privately that there had been a theft at the hotel and that suspicion had fallen on the plaintiff. It was held that the defendant made the statement to the plaintiff's master in discharge of a moral or social, though not a legal, duty, and that the occasion was privileged. There being no evidence of malice judgment was given for the defendant.

(6) So advice given in confidence, at the request of another and for his protection, is privileged ; and it seems that the presence of a third party makes no difference (*c*). But it seems doubtful whether a volunteered statement is equally privileged (*d*). Thus the character of a servant, given to a person requesting it, is privileged (*e*) ; and so, also, is the character of a person who states that she is a fit recipient of charity, given to, and at the request of, a person willing to bestow such charity, by the secretary of the Charity Organisation Society (*f*).

(7) Similarly a communication from an officer of government to his superior in a report containing defamatory statements (*g*), a communication from a clergyman to a lady of his staff, expressing his disapproval of her proposed

(*a*) *Adam* v. *Ward*, [1917] A. C. 309.

(*b*) [1891] 2 Q B. 341 ; *Emp.* v. *Padman Babul*, 16 I. C. 335.

(*c*) *Taylor* v. *Hawkins*, 16 Q. B. 308 ; *Clark* v. *Molyneux*, 3 Q. B. D. 237.

(*d*) *Coxhead* v. *Richards*, 15 L.J.C.P. 278 ; *Fryer* v. *Kinnersley*, 33 L. J. C. P. 96 ; but see *Davies* v. *Sneid*, L. R. 5 Q. B. 608.

(*e*) *Gardener* v. *Slade*, 18 L. J. Q. B. 334.

(*f*) *Waller* v. *Loch*, 7 Q. B. D. 619.

(*g*) *Narasimha* v. *Balwant*, 27 Bom. 585 ; *Jusab Tharia* v. *Morrison*, 15 Bom. L. R. 249 ; 19 I. C. 480.

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marriage, with imputations against the intended husband (*a*), and a communication by a local manager of a company to his directors intimating to them that the plaintiff had failed most utterly (*b*), were all held to be privileged. But a social and moral duty does not cover information furnished for reward by persons or bodies making a business of it (*c*), but inquiries and reports made for the members of a limited trade association are privileged (*d*).

(8) The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*e*).

Statements made by one having an interest to one having a corresponding interest.

(9) A privileged occasion arises, if the communication is of such a nature that it can be fairly said that he who makes it has an interest in making it, and that those to whom it is made have a corresponding interest in having the communication made to them. Thus, where a railway company dismissed one of their guards on the ground that he had been guilty of gross neglect of duty, and published his name in a monthly circular addressed to their servants, stating the fact of, and the reason for, his dismissal, it was held that the statement was made on a privileged occasion, and that the defendants were not liable. For, as Lord ESHER, M.R., said: "Can any one doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service?" (*f*). So joint owners of property, shareholders of a company and partners have this privilege in furtherance of their common interests (*g*).

Imputations made to

(10) However, imputations which, if made to persons having a corresponding interest, would be privileged in the

(*a*) *X.* v *Z.*, 83 P. R. 1908.

(*b*) *Leinman* v. *Holland*, 14 Mad. 51.

(*c*) *Mackintosh* v. *Dun*, [1908] A. C. 390.

(*d*) *London Association for Protection of Trade* v. *Greenlands Limited*, [1916] 2 A. C. 15.

(*e*) *Cowles.* v. *Potts*, 34 L J. Q. B. 247.

(*f*) *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189.

(*g*) *Quartz Hill Gold Mining Co.* v. *Beall*, 20 C. H. D. 501.

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persons not having a corresponding interest.

absence of actual malice, cease to be so if spread broadcast (*a*) Thus, imputations circulated freely against another in order to injure him in his calling, however bonâ fide made, are not privileged. For instance, a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*b*). So, the unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*c*). And where by the defendant's negligence that which would be a privileged communication if made to A., is in fact placed in an envelope directed to B., whereby the defamatory matter is published to B., the defendant will be liable (*d*).

Incidental publication to persons not having interest.

(11) But the privilege is not lost when the defamatory statement is in the reasonable and ordinary course of business incidentally published to clerks for the purpose of being copied. So if a solicitor dictates to his clerk a letter, which would be privileged if written by him personally, the solicitor's privilege covers the publication for this purpose to his clerk ; and if a company writes to another company a defamatory statement of a third person (which would be privileged), the publication to the clerks who in the ordinary course copy the letter, is privileged (*e*).

Extracts from Parliamentary papers.

(12) Extracts from, and abstracts of, Parliamentary papers and reports are privileged if published bonâ fide and without malice (*f*). The reports and papers themselves, if published by authority of Parliament, are absolutely privileged, and actions brought in respect thereof may be stayed (*g*).

Reports of judicial proceedings.

(13) The publication without malice of a fair and accurate report of judicial proceedings before a properly constituted judicial tribunal, exercising its jurisdiction in open court, is privileged (*h*). This is a common law defence, open to

(*a*) *Thyagaraya* v *Krishnasami*, 15 Mad. 314 ; *Narsingh Das* v. *Sadaram*, 41 All. 329.

(*b*) *Gilpin* v. *Fowler*, 9 Ex. 615.

(*c*) *Williamson* v. *Freer*, L. R. 9 C. P. 393

(*d*) *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B 54.

(*e*) *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842 ; *Edmondson* v. *Birch*, [1907] 1 K. B. 371 ; *Roff* v. *British & French etc. Co* , [1918] 2 K. B. 677.

(*f*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s 3 ; *Mangena* v *Wright*, [1909] 2 K. B. 958. See *Lala Lajput Rai* v. *The Englishman*, 36 Cal. 883, on appeal, 37 Cal. 574,

(*g*) Parliamentary Papers Act, 1840, ss. 1, 2.

(*h*) *Kimber* v. *Press Association, Limited*, [1893] 1 Q B. 65.

all persons. It is not the same as the absolute privilege given by statute to reports in newspapers when published contemporaneously (*a*).

Reports of *quasi*-judicial proceedings.

(14) Reports of their proceedings, published by *quasi* judicial bodies bonâ fide and without any malice, are privileged. For instance, where the General Council of Medical Education and Registration (who are empowered by statute to strike the names of persons off the register of qualified medical practitioners) struck off the plaintiff's name, and, in their annual published report, stated the circumstances which induced them to do so, it was held that in the absence of actual malice the publication was privileged (*b*).

Speeches at county councils, etc.

(15) So, too, there is qualified privilege for speeches made at meetings of district and county councils (*c*).

Newspaper reports of meetings, and publication of public notices, etc.

(16) By s. 4 of the Law of Libel Amendment Act, 888 (*d*), it is enacted that a **fair and accurate report published in any newspaper of the proceedings of a public meeting,** or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a town council, board of guardians, or local authority, constituted under the provisions of any Act of Parliament, or of any meeting of any commissioners, Select Committees of either House of Parliament, and the publication *at the request* of any Government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published, or made maliciously. But the protection intended to be afforded by that section is not available if the defendant has refused to insert in the newspaper in which the matter complained of appeared, a reasonable explanation or contradiction by, or on behalf of, the plaintiff. Nor is it available to protect fair and accurate reports of statements made to the editors of newspapers by private persons as to the conduct of a public officer (*e*).

(*a*) See *ante*, p. 145.

(*b*) *Allbutt* v. *General Council, etc.*, 37 W. R. 771.

(*c*) *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431; *Pittard* v. *Oliver*, [1891] 1 Q. B 474.

(*d*) 51 & 52 Vict. c. 64.

(*e*) *Davis* v. *Shepstone*, 11 App. Cas. 187.

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ART. 58.—*Apology.*

(1) At common law the fact that the defendant has apologised for having defamed the plaintiff is no defence.

(2) By statute the defendant **in any action for libel or slander** may prove **in mitigation of damages** that he made or offered an apology before the commencement of the action, or as soon afterwards as he had an opportunity, if the action was begun before he had an opportunity of doing so (*a*).

(3) In any action for libel contained in any **newspaper or other periodical** publication, it is a good **defence** that such libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper a full apology, or, if the paper or periodical is published at intervals exceeding one week, that he offered to publish the apology in any newspaper or periodical selected by the plaintiff (*b*). With this defence there must be payment of money into court by way of amends, and *no other defence can be pleaded* (*c*).

If the defendant intends to give evidence of an apology in mitigation of damages, he must give notice with his defence (*d*). The Act of 1888 also enables a defendant, in the case of a libel *in a newspaper*, to give evidence in mitigation of damage that the plaintiff has recovered, or

(*a*) Libel Act, 1843 (6 & 7 Vict. c. 96), s. 1.

(*b*) Libel Act, 1843, s. 2.

(*c*) Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2; R. S. C., Order XXII., r. 1,

(*d*) Libel Act, 1843, s. 1.

brought actions for, damages in respect of other libels to the same effect (*a*). Art. 58.

ART. 59.—*Slander of Title and Slander of Goods.*

(1) Slander of title is a false statement disparaging a person's title to property.

(2) Slander of goods is a false statement disparaging goods manufactured or sold by another.

(3) The slander may be oral or in writing or print.

(4) An action for slander of title or slander of goods will lie if—

(i) The statement is false;

(ii) The publication is malicious;

(iii) The publication causes special damage (*b*).

(1) Actions of this kind are not properly actions for libel or slander. The cause of action is for damage wilfully and intentionally done without just occasion or excuse (*c*). The statement to be actionable need not be defamatory of the person (*d*), and it will be observed that even though the statement is in writing, it is not actionable without proof of special damage (*e*). There must also always be evidence of actual malice, or at least absence of reasonable cause for making the statement (*f*).

(*a*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6.

(*b*) *Lyne* v. *Nicholls*, 23 T. L. R. 86; *Griffiths* v. *Benn*, 27 T. L. R. 346.

(*c*) *Per* BOWEN, L.J., In *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 [C. A.], at p. 527.

(*d*) *Ibid.*

(*e*) *White* v. *Mellin*, [1895] A. C. 154.

(*f*) *Wren* v. *Wild*, L. R. 4 Q. B. 730; *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86 [C. A.]; *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Halsey* v. *Brotherhood*, 19 Ch. D. 386 [C. A.].

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In a suit for slander of title, malice in law is not sufficient to show that the mark or combination of the plaintiff was falsely charged as a colourable imitation without legal justification or excuse. Malice in fact must be proved (*a*).

Special damage.

(2) In every case of this kind there must be proof of actual damage, *i.e.*, of actual and temporal loss, resulting from the slander. In the case of slander of goods, loss of custom and falling off in the sales is the usual kind of special damage. Where the slander is of title to property, real or personal, the special damage may be the diminished value of the property by reason of difficulty of selling or letting it (*b*).

Puffing one's own goods.

(3) For a person in trade to puff his own goods or proclaim their superiority over those of his rivals is not actionable, even though the statement is untrue and made maliciously, and causes damage to the rivals. Such a statement may be disparaging to the rivals' goods, but the fact that the person making the statement is a rival puffing his own goods is a lawful excuse for making the statement (*c*). And generally it seems that a disparaging statement of another's title or goods is excusable if made *bonâ fide* for the protection of one's own property, and not *malâ fide* for the purpose of injuring another's (*d*).

(4) Besides the award of damages the slander may be prevented by an injunction (*e*).

(*a*) *Nemi Chand* v. *Wallace*, 34 Cal. 495.

(*b*) *White* v. *Mellin*, *supra*; *Ratcliffe* v. *Evans*, *supra*.

(*c*) *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark*, [1899] 1 Q. B. 86 [C. A.].

(*d*) *Halsey* v. *Brotherhood*, 19 Ch. D. 386 [C. A.]

(*e*) See Art. 41 *ante*.

CHAPTER II.

OF MALICIOUS PROSECUTION.

ART. 60.—*General Rule.*

(1) Malicious prosecution of criminal proceedings consists in instituting unsuccessful criminal proceedings maliciously and without reasonable or probable cause (*a*).

(2) Malicious prosecution of criminal proceedings causing actual damage to the party prosecuted is a tort, for which he may maintain an action.

Distinct from false imprisonment.

The distinction between malicious prosecution and false imprisonment has already been pointed out. Prosecution consists in setting a judicial officer in motion. Imprisonment consists in causing a person to be arrested or imprisoned without the intervention of a judicial officer.

Analysis.

It will be seen from the above article, that in order to sustain an action for malicious prosecution, five factors must co-exist (*b*) viz. : (1) a prosecution of the plaintiff by the defendant ; (2) want of reasonable and probable cause for that prosecution ; (3) malice ; (4) the determination of the prosecution in favour of the party prosecuted ; and (5) damage caused to that party by the prosecution (*c*).

(*a*) See *Churchill* v. *Siggers*, 3 E. & B. 929, 937 ; *Johnson* v. *Emerson*, L. R. 6 Ex. 329 ; and *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674 [C. A.].

(*b*) See *Gopalakrishna* v. *Narayana*, 34 M. L. J. 515 ; 45 I. C. 803.

(*c*) *Abrath* v. *North Eastern Rail. Co.*, 52 L. J. Q. B. 620 ; *Cox* v. *English, Scottish and Australian Bank*, [1905] A. C. 168. See also *Ganesh Datta Singh* v. *Maniram Chaudri and Others*, 17 W. R. 283 (P. C.) ; *K. B. Barmji* v. *Port Commissioners*, 3 Bur. L T. 78 ; 8 I. C. 458 ; *Harish Chunder Neogi* v. *Nishi Kanta Banerjee*, 28 Cal. 591 ; *Crowdy* v. *O'Reilly*, 17 C. W. N, 554 ; 18 I. C. 737 ; *Semaki Chutiani* v. *Hemakanta Sarma*, 18 I. C. 830 ; *Padashin* v. *Maung Lun*, 8 Bur. L. T. 69 ; 29 I. C. 883 ; *Nazir Hassan* v. *Bakhtawar*, 56 I. C. 161.

Art. 60. If any one of these five factors is absent, no action will lie. It is, therefore, desirable to examine each one of these elements in detail.

ART. 61.—*Prosecution by the Defendant.*

(1) The prosecution must have been instituted by the defendant against the plaintiff, and not merely by the authorities on facts furnished by the defendant.

(2) A person who has not instituted proceedings maliciously may be guilty of malicious prosecution if, after they have been begun properly by himself or another, he continues them maliciously and without reasonable and probable cause, as when in the course of the proceedings he acquires positive knowledge of the innocence of the accused (*a*).

(1) The term 'prosecution' must not be understood in the limited sense in which it is used in the Code of Criminal Procedure. An application to take proceedings under the security sections of that Code will constitute a prosecution (*b*)

(2) To found an action for malicious prosecution, the prosecution must have been instituted by the defendant against

(*a*) *Per* COCKBURN, C.J., in *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.) 505, and see *Weston* v. *Beeman*, 27 L. J. Ex. 57. This seems to be the effect of the cases cited; but the point is nowhere very clearly decided. *Fitzjohn* v. *Mackinder* should be carefully studied, as the judges deciding it give different reasons for their decision; *Gaya Prasad* v. *Bhagat Singh*, 30 All. 525; 35 I. A. 189; *Town Municipality of Jambusar* v. *Girjasankar*, 30 Bom. 37; *Shama Bibi* v. *Chairman of Baranagore Municipality*, 12 Cr. L. J. 410; 6 I. C. 675; *Kazim Husain* v. *Basit Husain*, 61 I. C. 970.

(*b*) *Crowdy* v. *O'Reilly*, 17 C. L. J. 105; 18 I. C. 737; *Bhushan Prasad* v. *Phulman Singh*, 20 C. L. J. 578; 27 I. C. 449; *Chiranji Singh* v. *Dharam Singh*, 43 All. 402; *Mahomed Niaz Khan* v. *Jai Ram*, 41 All. 503; *Norendra Nath* v. *Jotish Chandra*, 67 I. C 705 (application for sanction to prosecute).

the plaintiff (*a*). According to the Bombay High Court a prosecution commences when the complaint is made, and it is sufficient if the charge was made to the magistrate with a view of inducing him to entertain it (*b*). But the Calcutta and Madras High Courts hold that the mere laying of a charge, unaccompanied by the issue of process is insufficient and would not give a cause of action (*c*), but that once summons is issued the commencement of the prosecution relates back to the laying of the information or making of the complaint (*d*).

(2) If a person bonâ fide lays before a magistrate a statemennt of facts, without making a specific charge of crime, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the pluintiff, the defendant who has complained to the magistrate is not responsible for the mistake. For *he* has not instituted the prosecution, but the magistrate (*e*). But if a person goes before a magistrate and makes a specific charge against another, as by swearing an information that the other has committed a criminal offence, he is the person prosecuting, for he and not the magistrate has set the law in motion (*f*). So, too, if a person instructs a solicitor to prosecute, he is liable for the consequences if he does it maliciously and without reasonable and probable cause.

(*a*) See *Jagadamba Prasad* v. *Raghunandan Lal*, 1 Pat. L. T. 422; 57 I. C. 392.

(*b*) *Ahmed Bhai* v. *Framji Edulji* 28 Bom. 226; (relying on *Clarke* v. *Postan*, 6 Car. & P. 423).

(*c*) *De Rozario* v. *Gulab Chand Anundjee*, 37 Cal. 358 (following *Yates* v. *The Queen*, 14 Q. B. D. 648; 52 L. T. 305); *Golap Jan* v *Bhola Nath Khetry*, 7 I. C. 255; on appeal, 38 Cal. 880; *Bishan Singh* v. *Ram Bahal*, 64 I. C. 741; *Godha Ram* v. *Desi Dav*, 1 P. R. 1915; 28 I. C. 273; *Sheik Meeran Sahib* v. *Ratnavelu Mudaliar*, 37 Mad. 181; *Digambar Das* v. *Bisweswar Chowdhury*, 41 I. C. 12.

(*d*) *De Rozario* v. *Gulab Chand Anundjee*, *supra* (following *Thorpe* v. *Priestnall*, 66 L J. Q. B. 248).

(*e*) *Wyatt* v *White*, 29 L. J. Ex. 193; *Cooper* v. *Booth*, 3 Esp. 135, 144; *Manickam Mudaliar* v. *Munaswami Naidu*, 29 M. L. J. 694; 31 I. C. 246. See also *Narasinga Rao* v. *Muthaya Pillai*, 26 Mad. 362; *Kanahaiya Lal*. v. *Kishen Lal*, 6 A L. J. 500; 2 I. C. 500; *Dhudnath Kandu* v *Mathura Prasad*, 24 All. 317; *Kishan Lal* v. *Moosi Raza*, 72 I. C. 57.

(*f*) *Periya Goundan* v. *Kuppa Goundan*, 42 Mad. 880; *Shanmuga Udayar* v. *Kundasami Asari*, 12 L. W. 170; 59 I. C. 973; *Pattu Lal* v. *Ram Sarup*, 16 A L. J. 468; 46 I. C. 190; *Jai Pande* v. *Jaldhari Raut*, 4 Pat. L. W. 98; 40 I. C. 679.

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(3) In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. "The question in cases of this kind must be—who was the prosecutor? The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police. That, again, is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. . . . If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the police by the bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the magistrate—it would be equally improper to allow him to escape liability because the peosecution has not technically been conducted by him" (*a*).

(4) It has been held that if a person acting bonâ fide swears an information before a magistrate, under s. 10 of the Criminal Law Amendment Act, 1885, that he has reasonable grounds for suspecting that a woman or girl is detained for immoral purposes, and thereupon the magistrate issues a search warrant, the person swearing the information is not a prosecutor, as the magistrate acts judicially upon such information, and the decision of the magistrate that there is reasonable cause for suspicion protects the person giving the information (*b*.

(*a*) *Gya Prasad* v. *Bhagat Singh*, 30 All. 525; 36 I. A. 189; followed in *Bandi* v. *Rama Din*, 6 A. L. J. 516; 2 I. C. 424; *Mini Kumari Bibi* v. *Surendra Narayan Chakravarti*, 10 C L. J. 226; 14 C.W N. 96; 3 I. C. 12; *Hari Charan Sant* v. *Kalidas Chandra Bhuyan*, 36 Cal. 278; *Bhul Chand Patro* v. *Palun Bas*, 12 C. W. N. 18 (N); *Tummala Nagabhushanam* v. *Venkataratham*, 8 M. L. T. 242; 8 I. C. 315; *Rajagopala Nayagar* v *Spencer & Co., Ld.*, 12 L. W. 87; 59 I C. 218.

(*b*) *Hope* v. *Evered*, 17 Q. B D. 338; *Carl Forstmann* v. *Forest*, 27 I. C. 591.

Art. 62.—*Want of Reasonable and Probable Cause.*

(1) The onus of proving the absence of reasonable and probable cause for the prosecution rests on the plaintiff (*a*).

(2) The jury find the facts on which the question of reasonable and probable cause depends; but the judge determines whether those facts do constitute reasonable and probable cause (*b*).

(3) No definite rule can be laid down for the exercise of the judge's determination (*c*); but the defendant will be deemed to have had reasonable and probable cause for a prosecution where (a) he took reasonable care to inform himself of the true facts; (b) he honestly, although erroneously, believed in his informa-

(*a*) *Lister* v. *Perryman*, L. R. 4 H. L 521; *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247; *Boja Reddi* v. *Perumal Reddi*, 26 Mad. 506; *Pestonji M. Mody* v. *The Queen Insurance Co.*, 25 Bom. 332 (P. C.); *Harish Chandra Neogi* v. *Nishi Kanta Banerjee*, 28 Cal. 591; *Syama Charan Karmokar* v. *Jhatoo Haldar*, 6 C. W. N. 289; *Hall* v. *Venkata Krishna*, 13 Mad. 394; *Ramayya* v. *Sivayya*, 24 Mad. 549; *Raghavendra* v. *Kashinathbhat*, 19 Bom. 717; *Swami Naidu* v. *Subramanya Mudali*, 2 M. H. C. R. 158; *Vengama* v. *Raghava*, 2 M. H. C. R 29; *Muneeamma* v. *Municipal Commissioners of Madras*, 8 M. H. C. R. 151; *Girdhar Lal Dyaldass* v. *Jagarnath Girdhar Bhai*, 10 B. H. C. R 182; *Nankuri Chandra Sarma* v. *Brahmomai Debi*, 3 W. R. 169; *Maniram Chaudri* v. *Ganes Datta Singh*, 5 W. R 134; *Mahendra Nath Datta* v. *Kailas Chandra Dutta*, 6 W. R. 245; *Gaur Hari Das* v. *Hayagrib Das*, 6 B. L. R. 371; *Aghor Nath Rai* v. *Radhika Prasad Basu*, 14 W. R. 339; *Kishen Lal* v. *Enayat Hussein Khan*, All. H. C. R. (1869) 11; *Weatherall* v. *Dillon*, All. H. C. R (1874) 200; *Vaidianadier* v. *Krishnasami Iyer*, 36 Mad. 375; *Sheik Muchi Osta* v. *Horsmul*, 17 C. W. N. 434; 19 I. C. 24; *Kamal Din* v. *Mir Abdulla*, (1917) P. R. 32; 38 I. C. 678.

(*b*) *Panton* v. *Williams*, 2 Q. B. 169 [Ex. Ch.]. In India, where there is no jury, the judge becomes himself the judge of the law and the facts (*Harish Chandra Neogi* v. *Nishi Kanta Banerjee*, *supra*; *Pestonji M. Mody* v. *The Queen Insurance Co*, *supra*).

(*c*) *Lister* v. *Perryman*, L. R. 4 H. L. 521,

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tion, and (c) that information (*a*), if true, would have afforded a *primâ facie* case for the prosecution complained of (*b*).

Burden of proof.

In both malicious prosecution and false imprisonment the question of what amounts to reasonable and probable cause is for the judge. But there is this important difference, that in malicious prosecution it is for the plaintiff to prove the absence of reasonable and probable cause; whereas in false imprisonment, the imprisonment is primâ facie wrongful, and it is for the defendant, if he can, to prove that he had reasonable and probable cause (*c*).

Reasonable and probable cause defined.

In *Hicks* v. *Faulkner* (*d*), HAWKINS, J., says: "I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was **probably** guilty of the crime imputed. There must be first and honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conviction; thirdly, such secondly mentioned belief must be based upon **reasonable** grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

A man who makes a criminal charge against another, cannot absolve himself from considering whether the charge is reasonable and probable, by delegating that question to an agent, even although that agent be presumably more

(*a*) *Heslop* v. *Chapman*, 23 L. J. Q. B. 49.

(*b*) See *Abrath* v. *North Eastern Rail. Co.*, *ubi supra*.

(*c*) *Hicks* v. *Faulkner*, 8 Q. B. D. 167; *Thakdi Hajji* v. *Badruddin Saib*, 29 Mad. 208.

(*d*) 8 Q. B. D. 167, at p. 171; *Rai Jung Bahadur* v. *Rai Gudor Sahoy*, 1 C. W. N. 537; *Bhim Sen* v *Sitaram*, 24 All. 363; *Shama Bibi* v *Chairman of Baranagore Municipality*, 12 C. L. J. 410; 6 I. C. 675; *Muthuveerappa* v. *Ramaswami*, 40 Mad. 285 (not simply improper and ulterior motive); *Chennareddi* v. *Venkata Swami*, 26 M. L. T. 214; 53 I C. 70 (courts should not draw a distinction between reasonable cause and probable cause).

capable of judging. Thus, the opinion of counsel as to the propriety of instituting a prosecution, will not excuse the defendant if the charge was in fact unreasonable and improbable. For as HEATH, J., said in *Hewlett* v. *Cruchley* (*a*), "it would be a most pernicious practice if we were to introduce the principle that a man, by obtaining the opinion of counsel, by applying to a weak man or an ignorant man, might shelter his malice in bringing an unfounded prosecution."

With regard to the amount of care which a prosecutor is bound to exercise before instituting a prosecution, it would seem that although he must not act upon mere tittle-tattle or rumour, or even upon what one man has told his immediate informant, without himself interviewing the first-mentioned man, yet where his immediate informant is himself cognizant of other facts, which, if true, strongly confirm the hearsay evidence, that will be sufficient to justify the prosecutor in acting, without first going to the source of the hearsay (*b*). But mere circumstances of suspicion cannot be treated as evidence of reasonable and probable cause as a defence to an action for malicious prosecution (*c*).

The test of the absence of reasonable and probable cause is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man ? Was it so to the maker of the charge ? (*d*) While malice may be inferred from the absence of reasonable and probable cause, want of reasonable and probable cause is not necessarily to be presumed from mere proof of malice (*e*). So an acquittal would not be primâ facie evidence of the falsity of the charge, and the absence of probable cause (*f*), though a

(*a*) 5 Taunt. 277 at p. 283 *Maya Mal* v. *Madho Mal*, 40 P. R. 1884; *Yachendrulu* v. *Narayanasami*, 9 M. L. J. 110; *Munhordas* v. *Gokuldas*, 4 Bom. L. R. 560.

(*b*) *Lister* v *Perryman*, L. R. 4 H. L. 521.

(*c*) *Ahmed Bhai* v. *Framji*, 28 Bom. 226 (relying on *Busst* v. *Gibbons*, 30 L J. Ex 75); *Shama Bibi* v. *Chairman of Baranagore Municipality*, *supra*.

(*d*) *Godai Narayan Gajapati* v. *Sri Ankitam Venkata*, 6 M. H. C. R. 85; *Sourendra Mohan Sinha* v. *Soshi Bhushan Koer*, 49 I. C. 232.

(*e*) *Dwarka Das* v. *Harihar Dat*, 4 A. W. N. 1.

(*f*) *Pestonji M. Mody* v. *The Queen Insurance Co.*, 25 Bom. 332 (P.C.); *Musalli* v. *Habib Khan*, 19 P. R. 1876; *Nund Kishen* v. *Kishen Dyal*, 4 P. R. 1868; *Kazim Husain* v. *Basit Husain*, 61 I. C. 970.

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conviction has been considered a bar to a civil action (*a*). In cases of acquittal on appeal, the fact that the plaintiff has been convicted by a competent court though he may subsequently have been acquitted on appeal is evidence of the strongest possible character if unrebutted, against the plea of want of reasonable and probable cause (*b*) ; the true rule is that if the plaintiff had been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause, unless the original conviction is proved to have proceeded on evidence known by the defendant to be false, or on the wilful suppression by him of material information (*c*). The proceedings of the criminal court are not evidence in a civil action (*d*), and a plea of guilty in the criminal court is evidence of the fact but not of a verdict of conviction (*e*). In India the question of reasonable cause is determined by the judge himself and is a mixed question of fact and law (*f*).

(*a*) *Swami Naidu* v. *Subramanya Mudali*, 2 M. H. C. R. 158 ; *Bhairab Chandra Chakrabati* v. *Mahendro Chakrabati*, 13 W. R 118.

(*b*) *Doongrussee* v. *Gridharu*, 10 W. R. 439 ; *Kaibutoolah* v. *Moteo*, 13 W. R. 276 ; *Parimi* v. *Bellamkonda*, 3 M. H. C R 238 ; *Jadubar Singh* v *Sheo Saran Singh*. 21 All. 26 ; *Sham Bibi* v. *Chairman of Baranagore Municipality, supra; Gungaram* v *Hoolasee*, 2 N. W P. 88 ; *Subramanya Pillai Chetty* v. *Maung Po Lu*, 2 L.B.R. 111 ; *Nga Tun Gyaw* v. *Mi Po Me, U. B. R.* (1906) Tort 5 ; *Bhul Chand Patro* v. *Palun Bas*, 12 C. W. N 818 note ; *Semaki Chutiani* v. *Hemakanta Sarma*, 18 I. C. 830 ; *Padarnath* v. *Dulam*, 10 A. L. J. 423 ; *Sowrendra Mohan Sinha* v. *Soshi Bhushan Koer*, 49 I. C. 232.

(*c*) *Bojareddi* v. *Perumal Reddi*, 26 Mad. 506 ; *Kona Thimma Reddi* v. *Bathini Chinna Reddi*, 16 M. L. J. 18 ; *Shama Bibi* v. *Chairman of Baranagore Municipality, supra ; Jag Narain* v. *Bidapat*, 4 Pat. L. T. 202 ; 72 I. C. 409.

(*d*) *Aghornath Rai* v. *Radhika Prasad Basu*, 14 W. R. 339 ; *Sheik Muchi Osta* v. *Horsmul*, 17 C. W. N. 434.

(*e*) *Shambu Chandra Chaudri* v. *Madhu Kaibarto and Others*, 10 W. R. 56. See also *Ali Baksh* v. *Samiruddin*, 12 W. R. 477, where it was held that a conviction for assault was no evidence of the factum of assault in a civil suit.

(*f*) *Shama Bibi* v. *Chairman of Baranagore Municipality, supra* ; *Harish Chunder* v. *Nishi Kanta*, 28 Cal. 591, explaining *Pestonji M. Mody* v *The Queen Insurance Co.*, 25 Bom. 332, *supra ;* but see 107 P. L. R. 1903 (where it was said to be a question of fact and now of law).

ART. 63.—*Malice.*

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Malice means improper motive, that is to say, any motive other than that of securing the ends of justice (*a*). Malice is a question of fact, and the absence of reasonable and probable cause does not necessarily infer malice (*b*); nor does the acquittal of the person proceeded against (*c*).

Illustrations.

Improper motives.

(1) If a person prosecutes another to prevent that other bringing actions against him (*d*), or to stop the mouth of a witness (*e*), or to frighten others and thereby deter them from committing depredations on the prosecutor's property (*f*); or to wreak vengeance for some illfeeling (*g*,) all these are indirect and improper motives which may constitute malice.

(2) So, too, where one is assaulted justifiably, and institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings knowing that he was wrong and has no just cause of complaint, malice may be presumed (*h*).

Honest mistake.

(3) In *Brown* v. *Hawkes* (*i*) it was pointed out that a prosecutor may act without reasonable and probable cause

(*a*) *Abrath* v. *North Eastern Rail Co.*; *Mitchell* v. *Jenkins*, 5 B & Ad. 595; *Bhim Sen* v. *Sitaram*, 24 All. 363; *Rai Jung Bahadur* v. *Rai Gudor Sahoy*, 1 C. W. N. 537; *K. B. Banerji* v *Port Commissioners*, 3 Bur. L. T. 78; 8 I. C. 458; *Kesho Prasad* v. *Ramkishen* 17 I C. 316; *Khaderunnissa* v. *Balsha Sahu*, 17 M. L. T. 391; 29 I. C. 12.

(*b*) *Brown* v *Hawkes*, [1891] 2 Q. B. 727; *Bradshaw* v. *Waterlow*, [1915] 3 K. B. 527. *Shama Bibee* v. *Chairman of Baranagore Municipality*, 12 C. L. J. 410; *Kasireddi Chemareddi* v. *Pachipulusu Venkataswami*, 26 M. L. T. 214.

(*c*) *Cored* v. *Peiris*, [1914] A. C. 549; *Roshun* v. *Nobin*, 12 W. R. 402; *Maung Po* v. *Ma Nyelin*, 3 U. B. R. 67.

(*d*) *Leith* v. *Pope*, 2 W. Bla. 1327.

(*e*) *Haddrick* v. *Heslop*, 12 Q. B. 257.

(*f*) *Stevens* v. *Midland Rail. Co.*, 10 Ex. 352, 356; *Madhu Lal* v. *Sahai Pande*, 27 Cal. 532; *In re Sanjivireddy*, 9 M. L. T. 172.

(*g*) *Jamnadas Shivran Bari* v. *Hambirmal*, 45 Bom. 327.

(*h*) *Hinton* v. *Heather*, 14 M. & W. 131.

(*i*) [1891] 2 Q. B. 718 [C. A.]; *Vogiazis* v. *Pappademitrion*, 6 Bur. L. T. 59; 20 I. C. 180.

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and yet not be malicious. Stupidity and malice are not the same thing; and if the defendant honestly believed in the plaintiff's guilt, and there is no evidence that he was actuated by any improper motive, even though he had not taken care to inform himself of the fact, and had no reasonable and probable cause for prosecuting, yet he cannot be said to have acted maliciously. Honest belief rebuts the inference of malice from absence of reasonable and probable cause.

Bad memory.

(4) So, too, where the defendant has honestly and bonâ fide instituted the prosecution, he is not liable, although owing to a defective memory he has wrongly accused the plaintiff (*a*).

(5) The state of the mind of the prosecutor at the time of the institution of the prosecution must be taken into consideration (*b*).

(6) But where there is a duty from a sense of which the defendant might have acted, it will be presumed that he acted from that motive, and the plaintiff must show that he acted not from a sense of duty but from some other improper motive, which constitutes malice in law (*c*).

Malice in a corporation.

(7) Whether a corporation can be guilty of malicious prosecution was, until recently, not free from doubt, it being said that a corporation having no mind cannot entertain malice (*d*). In *Cornford* v. *Carlton Bank* (*e*), DARLING, J., held that if a corporation institutes a prosecution acting on motives which in an individual would amount to malice, the corporation may be said to have prosecuted maliciously, and it is now well established that an action of malicious prosecution will lie against a corporation.

(*a*) *Hicks* v. *Faulkner*, 8 Q. B. D. 167.

(*b*) *Corea* v. *Peiris*, 14 C. W. N. 86; 5 I. C. 50.

(*c*) *Jehangir M. Cursetji* v. *Secretary of State for India*, 6 Bom. L. R. 131.

(*d*) See *per* Lord BRAMWELL in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

(*e*) [1899] 1 Q. B. 392. In the Court of Appeal ([1900] 1 Q. B. 22 [C. A.], it was conceded that the action would lie, and see *Citizen's Life Assurance Co.* v. *Brown*, [1904] A. C 423.

ART. 64.—*Failure of the Prosecution.*

It is necessary to show that the proceeding has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*a*).

Explanation of reasons for rule.

(1) This rule, which at first sight appears somewhat harsh, is founded on good sense, and applies even where the result of the prosecution cannot be appealed (*b*). As CROMPTON, J., said, in *Castrique* v. *Behrens* (*c*), "there is no doubt on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion, to the damage of the plaintiff. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

(2) Upon the same principle, an action for trespass by wrongfully causing execution to be issued under a judgment obtained by fraud or irregularity, will not lie until the judgment has been set aside. It is not competent to any person to aver anything contradicting or impeaching the judgment as long as it stands (*d*).

(3) In India it has been thought that a conviction unreversed on appeal bars an action for malicious prosecution (*e*). The plaintiff has to prove that he was innocent of the charge brought against him and that his innocence

(*a*) *Basèbè* v. *Mathews*, L. R. 2 C. P. 684.

(*b*) *Ibid.*

(*c*) 30 L. J. Q. B. 163, at p. 168.

(*d*) *Huffer* v. *Allen*, L. R. 2 Ex. 15; *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

(*e*) *Swami Naidu* v. *Subramanya Mudali*, 2 M. H. C. R. 158; *Bhairab Chandra Chakravarti* v. *Mahendro Chakravarti*, 13 W. R. 118.

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was pronounced by the tribunal before which the accusation was made (*a*). But an order of dismissal or acquittal by a criminal court would not be conclusive evidence of the falsity of the charge or the innocence of the plaintiff (*b*). Discharge terminates a prosecution as well as acquittal and creates a cause of action (*c*).

ART. 65.—*Damage.*

In order to support an action for malicious prosecution, it is necessary to show some damage resulting to the plaintiff as the natural consequence of the prosecution complained of, but this will be presumed in cases which of their nature involve damage to reputation or possible loss of liberty or credit (*d*)

Damage need not be precuniary.

The damage need not necessarily be pecuniary. "It may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty ; or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused" (*e*).

(*a*) *Nalliappa* v. *Kailappa*, 24 Mad. 59 ; *Harish Chunder* v. *Nishi Kanta*, 28 Cal. 591 ; *Syama Charan* v. *Jhatoo*, 6 C. W. N. 289 ; *K. B. Banerji* v. *Port Commissioners*, 3 Bur. L. T. 78 ; 8 I. C. 458 ; *Sheik Muchi Osta* v. *Horsmul*, 17 C. W. N. 434 ; 19 I. C. 24 ; *Goberdhan* v. *Ram Badan*, 44 All. 485 ; *Pohlo Ram* v. *Hukam Singh*, (1919) P. R. 32 ; 51 I. C. 279 ; *Maung Tha Hla* v. *Mokhlas*, 9 Bur. L. T. 48 ; 31 I. C. 324.

(*b*) *Nalliappa* v. *Kailappa*, *supra* ; *Corea* v. *Peiris*, *supra*.

(*c*) *Venu* v. *Coorya*, 6 Bom. 376.

(*d*) *Cotterell* v. *Jones and Ablett*, 21 L. J. C P. 2 ; *Byne* v. *Moore*, 5 Taunt, 187 ; *Quartz Hill Co.* v. *Eyre*, *Supra* ; *Wiffen* v. *Bailey*, [1915] 1 K. B. 600.

(*e*) Mayne's Treatise on Damages, p. 345.

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Art. 66.—*Maliciously taking Proceedings in Bankruptcy and Malicious Abuse of Legal Process.*

An action will lie for maliciously and without reasonable and probable cause instituting bankruptcy proceedings and abusing legal process (*a*).

The plaintiff in such an action must prove that the proceedings terminated in his favour (*b*), and (*semble*) that he has suffered damage beyond the mere costs incurred (*c*).

Comment.

Formerly actions lay for maliciously bringing a civil action, because although the action terminated in the defendant's favour, he might have suffered damage to his fair fame, and been put in peril of his liberty. Such actions are now never brought, and probably cannot be brought. In England, the defendant in an action is not now liable to arrest before judgment, and the result of the action (if it terminates in his favour) saves him from damage to his fair name. He may indeed incur costs beyond what he can recover from the other party, but this is not a legal ground of damage, as the only costs which the law recognises and for which it will recompense him, are the costs properly incurred in the action itself, and for which he gets judgment in the action. Hence there is no modern example of an action for maliciously taking ordinary civil proceedings (*d*). In *Mohini Mohan* v. *Surendra Narayan Singh* (*e*) it was held that the suit for damages lay for maliciously and without reasonable or probable cause obtain-

(*a*) *Johnson* v. *Emerson*, L. R 6 Ex. 329; *Wren* v. *Wield*, 38 L. J. Q. B. 327; *Raj Chandra Rai* v. *Shama Sundari*, 4 Cal. 583; *Surajmal* v. *Manakchand*, 6 Bom. L. R. 704; *Hukamchand* v. *Umar Din*, 21 P L. R. 1920.

(*b*) *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

(*c*) *Nanjappa* v. *Ganapathi*, 35 Mad. 598.

(*d*) See *per* Bowen, L.J., in *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674, 689; *Pranshanker* v. *Parbhudas*, 1 Bom. 467; *Bishun Singh* v. *Wyatt*, 14 C. L. J. 315; 11 I. C. 729; *Durbhangi* v. *Munshi Mahabir Prasad*, 41 I. C. 522.

(*e*) 42 Cal. 550.

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ing a perpetual injunction which was subsequently dissolved on appeal.

In India, under the Code of Civil Procedure a suit for compensation is maintainable for the improper issue of mesne and other legal process (*a*). An action for malicious arrest or malicious attachment before judgment can be maintained, but a mere application for the process and even an order made on it does not afford a cause of action *b*). Any person who unlawfully interferes with the exercise of the property rights of another, by procuring an injunction, commits an act in the nature of a trespass and it is not necessary for the plaintiff asking for damages to prove malice or want of reasonable or probable cause (*c*). Any process issued after judgment is not actionable, however malicious it may be (*d*) except when the judgment creditor seeks execution after the amount has been tendered or on satisfied judgment or for an amount in excess of what is really due (*e*). But an action for malicious detention may lie if the judgment-debtor or his property is detained maliciously, after the judgment is satisfied (*f*). It has been held that if after a person in good faith places all the facts of the case before the court and the court after adjudication thereon orders arrest or attachment the order is the act of the court, and the person who so applies is not liable for it (*g*).

If the person or property of a third person is wrongfully seized in execution, an action will lie irrespective

(*a*) Act V of 1908, Orders XXXVIII to XL; *Hasomal Hemandas* v. *Chinnammal*, 7 S. L. R. 101; 24 I. C. 261. *Nanjappa* v. *Ganapati*, 35 Mad. 398. See also *Madras Steam Navigation Co., Ld.*, v. *Shalimar Works Ld.*, 42 Cal. 85.

(*b*) *Rama Ayyar* v. *Govinda Pillai*, 39 Mad. 952.

(*c*) *Bhutnath* v. *Chandra Binode*, 16 C. L. J. 34; 16 I. C. 443.

(*d*) *Allen* v. *Flood*, (1898) A. C. at p. 92.

(*e*) *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; *Clissold* v. *Cratchley*, (1910) 2 K. B. 244; *Gilding* v. *Eyre*, 10 C. B. N. S. 592; *Bishun Singh* v. *Wyatt*, 16 C. W. N. 540.

(*f*) See *Moore* v. *Gardner*, 16 M. & W. 595.

(*g*) *Raj Chunder Roy* v. *Shama Soondari Debi*, 4 Cal. 583; *Thakdi Hajji* v. *Badruddin*, 29 Mad. 208; *Soobjan Beebee* v. *Shaikh Shureeatoolah*, 12 W. R. 329; also *Dhurmo Narain* v. *Sreemuthy Doosee*, 18 W. R. 440.

of the innocence or mistake on the part of the decree-holder (*a*) and no malice need be proved (*b*).

In a suit for damages for malicious abuse of process of court, the onus of proving want of reasonable and probable cause lies on the plaintiff (*c*). If for instance the object of the defendant in obtaining an order for attachment before judgment was not to prevent an apprehended alienation of property but to put pressure on the debtor to pay the debt, the defendant is guilty of malice (*d*) and is liable for all damage naturally consequent on his act (*e*).

Wrongful intervention in execution by a claim against attachment is not a tort and the plaintiff is not entitled to anything more than the costs allowed in those proceedings (*f*). A person who assists in the conduct of a search by the police is not liable in damages for illegal search (*g*).

But proceedings for bankruptcy and for winding up companies are *quasi*-criminal in their nature. The party against whom they are taken may suffer severely in his credit, and this is sufficient ground of damage to found the action, at all events in the case of a trader or trading company (*h*). Thus, in *Quartz Hill Gold Mining Co.* v. *Eyre*, it was held that, in an action for maliciously taking proceedings to wind up a company, no pecuniary loss or special damage need be proved, as the presentation of a

(*a*) *Jarmain* v. *Hooper*, 6 M. & G. 827; *Walley* v *McConnell*, 13 Q. B. 903; *Sabjain* v. *Sariatulla*, 12 W. R. 329; *Kanai Prasad* v *Hira Chand*, 14 W. R. 120; *Damodhar* v. *Lallu*, 8 B. H. C. R. 177; *Goma Mahad* v. *Gokaldas*, 3 Bom 74; *Parmeshri Das* v. *Basheshar Nath*, 129 P. R. 1908; *Murugappa* v. *Karanath*, 4 Bur. L. T. 220; 12 I. C. 20.

(*b*) *Kissori Mohun Roy* v. *Hardukh Das*, 17 Cal. 436 P. C.; *Ramasami* v. *Muthusami*, (1912) M. W. N. 42; 13 I. C. 799.

(*c*) *Veerabhadrappa* v. *Firm of Vannajee Vasanjee*, 31 M. L. J. 772; 38 I. C. 823.

(*d*) *Nanjappa Chettiar* v. *Ganapathi Gounden*, 35 Mad. 598.

(*e*) *Abdul Rahim* v. *Sital Prasad*, 41 All. 658; *Binda Prasad* v. *Ram Chandar*, 43 All. 452. See also *Bhushan Chandralal* v. *Narendra Nath*, 32 C. L. J. 236; 60 I. C. 280.

(*f*) *Hasomel Hemandas* v. *Chinnammal*, 7 S. L. R. 104; 24 I. C. 261.

(*g*) *Assan Alliar* v. *Masilamani*, 36 M. L. J. 252.

(*h*) *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674.

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petition for winding up is from its very nature calculated to injure the credit of a trading company. It may be that in the case of a non-trader, some other special damage would have to be shown (*a*).

No action will lie unless it is shown that the adjudication or winding-up order has been set aside. As long as it stands, it is conclusive evidence that the proceedings were properly taken, and therefore is an absolute bar to any action (*b*).

(*a*) See *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106 [C. A.]
(*b*) *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

CHAPTER III.

OF MAINTENANCE.

ART. 67.—*Definition.*

(1) Maintenance is the unlawful assistance, by money or otherwise, proffered by a third person to either party to a **civil suit**, to enable him to prosecute or defend it.

(2) Assistance of another in a suit is not unlawful if (a) the maintainer has a common interest in the action with the party maintained; or (b) the maintainer is actuated by motives of charity, *bonâ fide* believing that the person maintained is a poor man oppressed by a rich one.

(3) Special damage must be proved and the success of the maintained litigation is no bar to an action for maintenance (*a*).

Distinguished from malicious prosecution.

Maintenance differs from malicious prosecution in four respects:

(a) It applies to civil, not criminal proceedings.

(b) It consists not in instituting proceedings on one's own behalf, but in assisting another.

(c) Malice is not a necessary ingredient.

(d) It is not necessary to prove that the proceedings terminated in favour of the person who brings the action of maintenance.

Illustrations.

(1) Thus, in the well-known case of *Bradlaugh* v. *Newdegate* (*b*) the plaintiff, having sat and voted as a member

(*a*) *Orram, Hutt*, [1914] 1 Ch. 107; *Neville* v. *London Express Newspaper, Limited*, [1919] A. C. 368; *Hickman* v *Kent or Romney Marsh Sheep Breeders Association*, 37 T. L. R. 163 [C. A.].

(*b*) 11 Q. B. D. 1.

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of Parliament without having made and subscribed the oath, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed for so sitting and voting. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful:—*Held*, that the defendant and C. had no common interest in the result of the action for the penalty, and that the conduct of the defendant in respect of such action amounted to maintenance, for which he was liable to be sued by the plaintiff. The plaintiff accordingly recovered all the costs he had incurred in the first action.

Common interest.

(2) But, on the other hand, where there is a common interest believed on reasonable grounds to exist, assistance in bringing or defending an action is justifiable; A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow commoner defending rights of common, or a landlord defending his tenant in a suit for tithes (*a*).

(3) So, if a number of proprietors of land subscribe to defend an action relating to the land of one in the reasonable belief that they have a common interest in the result, that is not maintenance (*b*).

Interest arising out of charity.

(4) The other exception is where a rich man gives money to a poor man to maintain a suit out of charity. And the motive is none the less charitable within this exception because it is induced by common religious sympathy, as when the Kensit Crusade Committee assisted a poor man in taking proceedings to get a child removed from a home to the religious principles of which the committee objected (*c*). And this exception is applicable notwithstanding that if the person advancing the money had made full inquiry, he would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted (*d*).

(5) In a recent case the plaintiff contemplated laying out land on the south coast as a building estate and

(*a*) *Per* COLERIDGE, C J., in *Bradlaugh* v. *Newdegate*, 11 Q. B. D. at p 11.

(*b*) *Findon* v. *Parker*, 11 M & W. 675. See, too, *British Cash and Parcel Conveyers, Limited* v. *Lamson Store Service Co*, [1908] 1 K B 1006 [C. A.], and *Alabaster* v. *Harness*, [1895] 1 Q. B. 339 [C A.].

(*c*) *Holden* v. *Thompson*, [1907] 2 K. B. 489.

(*d*) *Harris* v. *Briscoe*, 17 Q. B. D. 504 [C. A.].

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offered a prize for a suitable name for the intended resort. He offered also consolation prizes of freehold building plots, subject to the payment by the winners of these of three guineas for the conveyance of their respective plots to them. Defendants in their newspaper alleged the competition was not *bonâ fide*, and that the prizes really were sales of the land at a profit. Defendants offered to take legal proceedings at their own expense on behalf of consolation prize-winners to recover the three-guinea fees. Two actions were brought by defendants' solicitors in this behalf and were successful. No special damage was shown by the plaintiff. It was held: (1) The success of the maintained action did not deprive plaintiff of his right of action for maintenance; (2) but his failure to prove special damage caused his action to fail (*a*).

Indian law.

(6) The English law of maintenance and champerty has not been introduced as specific law into India, and has therefore no application to natives of India (*b*). An agreement to supply funds for a litigation or to share the subject of litigation, if recovered, is not *per se* opposed to public policy. But it would be so, if found to be extortionate, unconscionable or inequitable, or not a "bona fide one for the acquisition of an interest on the subject of the litigation, but an illegal transaction got up for the purpose merely of spoil or litigation, disturbing the peace of families and carried on from a corrupt improper motive" (*c*). Accordingly, where an agreement provided that in consideration of maintaining a suit a stranger should have the whole of the thing in dispute and something more in the event of success of the

(*a*) *Neville* v. *London Express Newspaper, Limited*, [1919] A. C. 368.

(*b*) *Panchcowree Mahtoon* v. *Kaleechurn*, 9 W. R. 490; *Mayor of Lyons* v. *East India Co.*, 1 M. I A. 176; *Ram Coomar* v. *Chunder Canto Mookerji*, 2 Cal 233; 4 I. A. 23; *Chunni Kuar* v. *Rup Singh*, 11 All. 57; *Pitchakuttichetti* v. *Kamala Nayakan*, 1 M. H. C. R. 153; *Raja Rai Bhagwat* v. *Debi Dayal Sahu*, 35 Cal. 420; as to its applicability in the presidency towns, see *Grose* v. *Amritmoyi Dasi*, 4 B. L R. (O. C. J.) 1; *Damodhar Madhavji* v. *Kahandas Narandas*, 8 B. H. C. R. 1; *Baldeo Sahai* v. *Harban*, 33 All. 626; *Mangal Prasad* v. *Nabi Baksh*, 43 I. C. 74.

(*c*) *Chedambara* v. *Renja Krishna*, 13 B. L. R. 509; *Fischer* v. *Kamala Naicker*, 8 M. I. A. 170; *Raghunath* v. *Nil Kanth*, 20 Cal. 843; *Tarachand* v. *Suklal*, 12 Bom. 559; *Ahmed Bhoy* v. *Vullebhoy* 8 Bom 323; *Debi Dayal Sahoo* v. *Bhan Pertap Singh*, 31 Cal. 433; *Gopal* v. *Gangaram*, 14 Bom. 72; *Sivaramayya* v *Ellamma*, 9 M. L. J. 17; *Gholam* v. *Walidad*, 70 P R. 187; *Indar Singh* v. *Munshi*, 1 Lah. 124; *Weld and Co.* v. *Sher Ahmed*, 59 I. C. 10.

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suit, and that he should be the master of the litigation by compelling it to be carried on by an attorney to be determined by him, or where an agreement stipulated for the payment of a large sum of money (Rs. 25,000) in consideration of financing a litigation, it was held that the transactions were unconscionable and opposed to public policy (*a*). But where the vendor merely accepted an inadequate price on account of his needs, or where the sale was for an inadequate price and for the purpose of a speculative suit against a person claiming adversely to the plaintiff's vendor, or where in return for advances for litigation a person is promised the return of moneys without interest and a share in the property, in all such cases, it was held that the arrangements were valid in law (*b*). Even in cases where a document is champertous, the promisee is entitled to recover the advances made by him for the litigation (*c*).

(*a*) *Mullah Jaffarji* v. *Yacali Kadar Bi*, 7 M. H. C. R 128; *Chunni Kuar* v. *Rup Singh, supra*; *Raja Mohkam Singh* v. *Raja Rup Singh*, 15 All. 352 (P C); *Jhandu Khan* v. *Barkurdar*, 150 P. R. 1889; *Sheik Abed Hussein* v. *Lalla Ram*, 13 W. R 426; *Dhallu Missar* v. *Jiwan Singh*, 79 P. R 1894; *Vijiaraghava* v. *Pranal Anne*, 1 M. L. J. 340; *Lal Achal Ram* v *Raja Kazim*, 9 C. W N. 477; *Gossain Ramdhan* v *Gossain Dalmir*, 14 C. W. N. 191; *Goculdas* v. *Lakhmidas*, 3 Bom. 402.

(*b*) *Gurusami* v *Subbaraya*, 12 Mad. 118; *Ramanuja Aiyangar* v. *Narayana Aiyangar*, 18 Mad 374; *Virabhadra* v. *Guruvenkata*, 22 Mad. 312; *Stewart* v. *Ramchand*, 26 P. R. 1906.

(*c*) *Venkatapathiraju* v. *Venkatasubhadrayamma*, 47 I. C. 563.

CHAPTER IV.

OF HARBOURING AND SEDUCTION.

ART. 68.—*Enticing and Harbouring.*

Every person is liable to an action for damages who wilfully assaults or entices away another's wife or servant, or knowingly harbours a wife or a servant who has wrongfully quitted his or her master's service (*a*).

The gist of the action for enticing away or harbouring a wife or servant is loss of society of the wife or of the services of the servant. Formerly actions were sometimes brought for beating a wife or servant, whereby the husband or master lost the society or services of his wife or servant. Actions of this sort are now rarely brought.

It seems that in the case of a **servant** (where the action is not brought by a parent or other person *in loco parentis*), the only damages recoverable are the actual pecuniary loss which the plaintiff suffers (*b*).

A master whose servant is injured by the negligence of the defendant, may, it seems, sue for damages for loss of service, unless the injuries have caused the immediate death of the servant (*c*).

(*a*) *Winsmore* v. *Greenbank*, Willes, 577; *Smith* v. *Kaye*, 20 T. L. R. 261; *Blake* v. *Lanyon*, 6 Term Rep. 221.

(*b*) *McKenzie* v. *Hardinge*, 23 T. L. R. 15. In this case the defendant seduced a servant of the plaintiff so that she became pregnant and the plaintiff lost her services; *Frederick Wilkins & Bros., Limited* v. *Wedver*, [1915] 2 Ch 322, a case of knowingly harbouring a servant during a breach of contract of services.

(*c*) *Berringer* v. *Great Eastern Rail. Co*, 4 C. P. D. 163; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648 [C. A.].

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ART. 69.—*The ordinary Action for Seduction.*

(1) A parent may bring an action for damages against one who seduces his daughter whilst she is in his service, whereby he is deprived of her services.

(2) The plaintiff must prove (a) that the female seduced was at the time of the seduction in his service, actual or constructive (*a*); (b) that he lost her services, either by reason of her pregnancy and confinement, or by reason of her being kept away by the persuasion of the defendant (*b*).

(3) A daughter is constructively in her parents' service if she lives at home and performs in fact any slight services.

(4) A daughter under the age of twenty-one, unmarried and not in other service, is presumed to be in the service of her parents (*c*).

Foundation of action loss of service.

The ordinary action for seduction is founded on the action for assaulting or enticing away a servant. Accordingly, it is always necessary to prove that the female seduced was in the service of the plaintiff, and that in consequence of the seduction the plaintiff lost her services. The substance of the action, however, is not the loss of services, but the injury done to the female seduced and to the honour of her family. She cannot bring an action herself, for she must have given her consent to the connexion, and *volenti non fit injuria*. Hence the action must be brought by some one who has been deprived of her services by the wrongful act of the seducer.

Accordingly, the plaintiff in an action for seduction must always prove—

(i) That the female seduced was in his service, actual or constructive, at the time of the seduction.

(*a*) *Davies* v. *Williams*, 10 Q B 725; *Peters* v. *Jones*, [1914] 2 K. B. 781.

(*b*) *Hedges* v. *Tagg*, L. R. 7 Ex 283; *Evans* v. *Walton*, L R. 2 C. P. 615.

(*c*) *Harris* v. *Butler*, 2 M. & W. 539, 542.

(ii) That by reason of her confinement or otherwise, he was deprived of her services. Art. 69.

Who can bring action.

The action may be brought not only by a parent, but by any one *in loco parentis*, such as a person who has adopted the girl as his daughter, or a brother or an aunt with whom the girl makes her home (*a*). It is not necessary that the female seduced should have been under a contract of service with the plaintiff, it is enough that she lived in his house and in fact performed services.

Though these actions are usually brought for loss of service by the debauchery and consequent illness of the daughter, this is not a necessary part of the cause of action. It is enough to show that the daughter has been enticed away. In such a case, even though there was no actual contract of service, the parent may recover general damages for being deprived of the services actually rendered by his daughter. Perhaps cases of this sort belong more properly to those dealt with in the preceding Article, but general damages for loss of reputation and injured feelings may, it seems, be given (*b*).

Illustrations.

Evidence of service.

(1) Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her widowed mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother :—*Held*, that there was no evidence of service at the time of the seduction And by KELLY, C. B., and MARTIN and BRAMWELL. BB., that the action must fail also on the ground that *the confinement* did not take place whilst the daughter was in the plaintiff's service (*c*).

(2) When a girl was seduced whilst living at home with her father and mother, but the father died before her confinement, it was held that the widowed mother could not bring an action against the seducer, as the girl was not in her service at the time of the seduction, but in that of the father (*d*).

(*a*) See note to *Fores* v. *Wilson*, 1 Peake, 55, 56; *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254 [C. A.].

(*b*) See *Evans* v. *Walton*, L. R. 2 C. P. 615.

(*c*) *Hedges* v. *Tagg*, L. R. 7 Ex. 283.

(*d*) *Hamilton* v. *Long*, [1903] 2 I. R. 407; affirmed, [1905] 2 I. R. 552 [C. A.]

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(3) In the case of a daughter living at home, such small services as milking, or even making tea, are sufficient evidence of service (*a*).

(4) Where a girl was in the defendant's service when seduced by him, but was allowed to go home for an afternoon and evening twice a week, and on those occasions assisted in household work and in looking after the other children, it was held that the relationship of master and servant did not exist between the plaintiff and the daughter so as to support an action for seduction (*b*).

(5) And where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*c*); not even when she partly supports her father (*d*).

Daughter under age.

(6) The plaintiff's daughter, *being under age*, left his house and went into service. After nearly a month, the master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. It was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient constructive service to maintain an action for the seduction (*e*).

(7) Where the child is only absent from her father's house on a temporary visit, there is no termination of her services, provided she still continues, in point of fact, one of his own household (*f*).

(8) A Hindu father can maintain a suit for damages for the abduction of his daughter while under his protection owing to desertion by her husband, and recover the costs incurred in a successful prosecution of such abduction (*g*), but it is doubtful whether a suit for damages for loss of her services would be maintainable.

(*a*) *Bennett* v *Allcott*, 2 Term Rep. 166; *Carr* v. *Clarke*, 2 Chit. R. 260.

(*b*) *Whitbourne* v. *Williams*, [1901] 2 K B. 722 [C. A.]. See also *Thompson* v. *Ross*, 5 H. & N. 16.

(*c*) *Dean* v. *Peel*, 5 East. 45.

(*d*) *Manley* v, *Field*, 29 L. J. C. P. 79.

(*e*) *Terry* v. *Hutchinson*, L. R. 3 Q B. 599.

(*f*) *Griffiths* v. *Teetgen*, 15 C. B. 344.

(*g*) *Ram Lal* v. *Tularam*, 4 All. 97. As to damages for loss of services STRAIGHT, C. J., and OLDFIELD, J., differed, the former being in favour of, and the latter against, its maintainability.

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Action by brother.

(9) When an orphan girl, who lived on a farm with her younger brother and managed the house for him was seduced, it was held that there was sufficient relation of master and servant to enable him to bring an action and recover general damages against the seducer (*a*).

ART. 70.—*Misconduct of Parent.*

If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*b*).

ART. 71.—*Damages in ordinary Action for Seduction.*

(1) In cases of seduction, in addition to the actual damage sustained, including any expenses incurred through the daughter's illness, damages may be given for the loss of the society and comfort of the daughter who has been seduced, and for the dishonour, anxiety, and distress which the plaintiff has suffered (*c*).

(2) Where more than ordinarily base methods have been employed by the seducer, the damages

(*a*) *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254 [C. A.].

(*b*) *Reddie* v. *Scoolt*, 1 Peake, 240.

(*c*) *Bedford* v. *McKowl*, 3 Esp. 119; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599. See *Ram Lal* v. *Tularam*, *supra*.

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may be aggravated. On the other hand, the defendant may show, in mitigation of damages, the loose character of the girl seduced.

(1) Thus, as was observed by Lord ELDON, in *Bedford* v. *McKowl* (*a*), "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Damages given by a jury for this kind of tort, will, therefore, rarely be reduced by the court on the ground that they are excessive.

(2) *A fortiori* will this be the case, where the seducer has made his advances under the guise of matrimony. As was said by WILMOT, C.J., in a case of that character: "If the party seduced brings an action for breach of promise of marriage (*b*), so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*c*).

Mitigation of damages.

(3) On the other hand, the defendant may, in mitigation of damages, call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*d*). And, generally, the previous loose or immoral character of the girl seduced is ground for mitigation; as, for instance, the using of immodest language or submitting herself to the defendant under circumstances of extreme indelicacy.

(*a*) 3 Esp. 119.

(*b*) The loss caused to the plaintiff by *breach* of a *promise* to marry, however, is not to be taken into consideration, for that is a civil injury to *her* and not to the father.

(*c*) *Tullidge* v. *Wade*, 3 Wils. 18.

(*d*) *Eager* v. *Grimwood*, 16 L. J., Ex. 236; *Verry* v. *Watkins*, 7 C. & P. 308.

CHAPTER V.

TRADE MOLESTATION.

ART. 72.—*Inducing Breach of Contract.*

A person who knowingly and without sufficient justification induces another to break a contract with a third person whereby that third person suffers damage, commits a tort at common law (*a*).

Comment.

This proposition of law was established after a good deal of controversy by the cases cited in the note. It was at one time supposed that though an action lay for inducing a menial servant to break his contract of service, the rule did not apply to other contracts; but by successive stages the rule has been extended to all contracts, such as a contract with an opera singer, or a contract to sell goods (*b*).

To entitle the plaintiff to succeed in an action for procuring a breach of contract, he must not only prove that the defendant procured others to commit the breach, but that he did so knowing that there was such a contract (*c*). Even continuing a servant in employment after notice that he is in the service of another gives a cause of action (*d*). Malice is not the gist of the action, but if malice is alleged and proved, it may displace the protection or the privilege which arises from the relation between the party who procures the breaking of the contract and the party who breaks the contract (*e*). Probably the existence of

(*a*) *Lumley* v. *Gye*, 2 E. & B. 216; *Temperton* v. *Russell*, [1893] 1 Q. B. 715 [C. A.]; *Quinn* v. *Leathem*, [1901] A. C. 495; *Sher Ali* v. *Ahmad Ali Bohra*, 13 C. P. L. R. 23.

(*b*) See the Illustrations.

(*c*) *Pandurang* v. *Nagu*, 38 Bom. 598.

(*d*) *Fred. Wilkins & Bros., Ld.* v. *Weaver*, [1915] 2 Ch. 322; *Blake* v. *Lanyon*, (1795) 6 T. R. 221.

(*e*) *Colquhoun* v. *Fanny Smither*, 7 M. L. T. 394; 5 I. C. 475.

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an earlier contract with the defendant inconsistent with the plaintiff's contract may be a justification (*a*).

In connection with actions of the kind discussed in this Article, the effect of the Trade Disputes Act, 1906 (*b*), must be considered. That Act, besides enacting that no court shall entertain any action of tort against a trade union (*c*), provides (*d*) that: "*An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment.*"

This section gives no protection to persons who induce breaches of contract by **threats** or **violence**, for then there is some other ground of action besides the ground that "it induces some person to break a contract." But it changes the law in this respect, that if the inducement to break a contract be **without threat or violence**, then this is no longer actionable if it is done "in contemplation or furtherance of a trade dispute" (*e*). The fact that trade union officials take part in a dispute does not make it a trade dispute (*f*).

Examples.

Lumley v. *Gye.*

(1) The plaintiff agreed with a famous singer to perform in an opera. The defendant, a rival manager, offered the singer a large sum of money to break her contract with the plaintiff and sing for him. Assuming that there was *an actual contract of service*, a breach of which the defendant had knowingly brought about and the plaintiff had thereby suffered damage, there was a good cause of action (*g*).

(*a*) *Smithies* v. *National Association of Operatives Plasterers*, [1909] 1 K. B. at p. 387; *Rend* v. *Friendly Society of Operative Stone Masons & Co.*, [1902] 2 K. B. 88; *Sankaralinga* v. *Kandasami*, 30 Mad. 413.

(*b*) 6 Edw. 7. c. 47.

(*c*) *Ibid.*, s. 4. See *ante*, Art. 21.

(*d*) By *Ibid.*, s. 3.

(*e*) *Per* Lord LOREBURN in *Conway* v. *Wade*, [1909] A. C. 506, 511. As to what is a trade dispute, see that case and the definition in the Trade Disputes Act of 1906: and see *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Hodges* v *Webb*, [1920] 2 Ch. 70; *Ware & De Freville Ld.* v. *Motor Trade Association*, [1921] 3 K. B 40.

(*f*) *Larkin* v. *Long*, [1915] A. C. 814.

(*g*) *Lumley* v. *Gye*, 2 E & B. 216 followed and approved in Court of Appeal in *Bowen* v. *Hall*, 6 Q. B D. 333 [C. A.], and approved by the House of Lords in *Quinn* v. *Leathem*, [1901] A. C. 495; *The Indo Burma Oil Fields* v. *Burma Oil Co. Ld.*, 66 I. C. 794.

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Temperton v. *Russel*.

(2) In order to induce the plaintiff to carry on his trade in a particular manner, agreeably to the wishes of a trade union, the defendants induced B. to break a contract he had with the plaintiff for the supply of building materials The plaintiff thereby suffered damage and the defendants were held liable (*a*).

Procuring breach of contract by fraud.

(3) The plaintiffs sold their goods wholesale to factors who entered into agreements with them not to sell them to dealers on the plaintiffs' "suspended list." The defendants employed agents to obtain the plaintiffs' goods for them from these factors by falsely representing that they were independent dealers and dealing in fictitious names. By these fraudulent means the defendants induced the factors to break their agreements with the plaintiffs, and as they had interfered, without justification, with the contractual relations between the plaintiffs and the factors, and the plaintiffs had thereby suffered damage, they had a cause of action against the defendants (*b*).

(4) The plaintiff agreed to enter into a contract of marriage with the defendant's son. The defendant by malicious and false representations induced her son to break the contract. In an action for damages for inducing the breach of promise of marriage, it was said that the general doctrine of common law applied equally in all cases irrespective of the relationship of the inducer and induced, and though "it cannot be reasonably maintained that a parent or guardian may not advise his daughter or ward to break off an improvident engagement with an unworthy suitor, but if the breaking of the engagement is procured maliciously by means of misrepresentation, the person so procuring a breach is not protected" (*c*).

Art. 73.—*Molestation by Threats, Violence and Conspiracy.*

(*a*) One who intentionally and without sufficient justification by threats, intimidation, molestation or violence, induces persons not to work

(*a*) *Temperton* v. *Russel*, [1893] 1 Q. B. 715 [C. A.].

(*b*) *National Phonograph Co.* v. *Edison Bell Consolidated Phonograph Co*, [1908] 1 Ch. 335 [C. A.].

(*c*) *Colquhoun* v. *Fanny Smither*, *supra*; *Jekisondas* v. *Ranchoddas*, 41 Bom. 137. See *per* Stirling L. J., *Glamorgan Coal Co.* v. *South Wales Miners Federation*, [1903] 2 K. B. 573.

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for or trade with another whereby that other suffers damage, commits a tort at common law (*a*).

(*b*) Combination to advance self-interest or to injure another's interests by acts which those combining are entitled by law to do individually, is not actionable at the suit of a party whose interests are thereby injured. And combination, even to harm another by the exercise in a lawful manner of a right which is a legal right of each person so combining, gives no ground of action to the party injured (*b*).

(*c*) In the presence or absence of combination where illegal means are employed either to advance the lawful trade or other interests of the person or persons employing such means or to injure the interests of another, the employment of such means gives the injured party a right of action (*c*).

(*d*) No combination can be a conspiracy unless it is an agreement between two or more persons to do an unlawful act or to effect a lawful purpose by unlawful means (*d*).

Examples.
Molestation.

(1) The plaintiffs were endeavouring to trade with natives on the coast of Calabar. The defendant fired a cannon at the natives in order to drive them away and thereby deterred them from trading with the plaintiffs. This was held actionable (*e*)

(*a*) *Quinn* v. *Leathem*, [1901] A. B. 495.

(*b*) *Mayor of Bradford* v. *Pickles*, [1895] A. C. 598, 601; *Mogul S. S. Co.*, v. *McGregor, Gow & Co.*, [1892] A. C. 25; *Allen* v. *Flood*, [1898] A. C. 1; *Davies* v. *Thomas*, [1920] 2 Ch. 189.

(*c*) *Quinn* v. *Leathem*, [1901] A. C. 495; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244.

(*d*) *Quinn* v. *Leathem*, [1901] A. C. 495; see judgment of Lord LINDLEY, at p. 539.

(*e*) *Tarleton* v. *M'Gawley*, 1 Peake, 205.

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(2) The plaintiff was a stone mason. The defendant was held liable for threatening his workmen and customers with mayhem and suits so that they desisted from doing business with the plaintiff (*a*).

Warning. *Allen* v. *Flood.*

(3) The plaintiffs were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were **liable to be discharged at any time.** Some ironworkers who were employed on the ironwork of the ship objected to the plaintiffs being employed, on the ground that they had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The defendant, who was a delegate of the union, was sent for by the ironworkers, and informed that they intended to leave off working. *The defendant then warned the employers that, unless the plaintiffs were discharged, all the ironworkers would be called out on strike*, and that wherever the shipwrights were employed the iron men would cease work. The employers accordingly discharged the plaintiffs, *i.e.*, lawfully terminated their engagement and refused to re-engage them. They broke no contract in so doing. The plaintiffs thereupon sued the defendant, and the jury found that he had maliciously induced the employers to "discharge" the plaintiffs, and gave damages. The House of Lords, however, by a majority, dismissed the action, on the ground that the defendant had violated no legal right of the plaintiffs, and done no unlawful act in merely *warning* the employers of the consequences of their continuing to employ the plaintiffs; and that therefore his conduct, however malicious or bad his motive might be, was not actionable (*b*).

Note that no threats, violence or intimidation were used by the defendant. He only warned them of the danger which would result from continuing to employ the plaintiffs.

(4) In *Quinn* v. *Leathem* the defendants were guilty of an illegal act in that they used threats and coercion of the plaintiff's customers and thereby infringed the liberty of action of these latter (*c*), and similarly in *Pratt* v. *British Medical Association* the defendants were guilty of illegal acts in using coercion of their own members by threat of ostracism of each member (similar to that inflicted on the

(*a*) *Garrett* v. *Taylor*, Cro. Jac. 567.

(*b*) *Allen* v. *Flood*, [1898] A. C. 1.

(*c*) *Quinn* v. *Leathem*, [1901] A. C. 495; see judgment of Lord LINDLEY, at p. 539.

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plaintiffs) who failed to comply with the dictated policy of the Association.

(5) An action on conspiracy would lie in India where two or more persons combine to injure a person, though if one of them did the same act by himself and without any preconcert with others he would escape liability. The essential elements whether of a criminal or of an actionable conspiracy are the same. But in an action in tort, general damage is sufficient, while in an action on conspiracy, special damages are necessary (*a*).

Again, conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been done without pre-concert, have involved a civil jury to the plaintiff. A mere conspiracy to injure a man, without an overt act resulting in the injury, does not furnish a cause of action. So the giving of false evidence, though alleged to be the result of a conspiracy, would not furnish a right of civil action (*b*); nor would a concerted action on the part of the defendants to prevent the rise in the bids at an auction sale give rise to a liability for conspiracy (*c*). Similarly, where persons combine together to further their own trade interests and increase their profits by inducing people to trade with them exclusively, this is not actionable if no unlawful means are used, although the combination, if successful, necessarily results in loss of trade to their rivals who are not within the combination (*d*).

ART. 74.—*Unfair Competition. Passing off.*

A trader who gets up, describes or marks his goods in such a way as would be calculated to deceive an ordinary purchaser into thinking they are the goods of another, so that he would be likely to secure part of the custom of that other,

(*a*) *Weston* v. *Peary Mohan Das*, 40 Cal. 898. See also *Hem Chandra Roy* v. *Krishna Chandra Saha*, 47 Cal. 1079.

(*b*) *Templeton* v. *Laurie*, 25 Bom. 230.

(*c*) *Mahomed* v. *Sarvasi*, 2 Bom. L. R. 640.

(*d*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25.

commits a tort, and is liable in damages or to be restrained by injunction (*a*). Art. 74.

Actions of this kind must not be confused with actions for infringement of trade marks, the right to enjoy which is statutory. The wrongs we are now discussing are torts at common law for which an action can be brought for damages (*b*), though the remedy sought is generally an injunction in the Chancery Division. Comment.

Where a trader gets up his goods as those of another it is not necessary to prove that he does so fraudulently with intent to deceive, or that any one is in fact deceived. "All that it is necessary to prove is that the defendants' goods are so marked, made up, or described by them as to be calculated to deceive ordinary purchasers, and to lead them to mistake the defendants' goods for the goods of the plaintiffs" (*c*), for "no man can have any right to represent his goods as the goods of another person" (*d*). Passing off goods as those of another.

Generally speaking, a man may use his own name, even though his goods may in consequence be mistaken for those of another (*e*). So, if two members of a learned profession happen to have the same name each may use it, though the result may be that he gets some of the clients of the other. But when a person assumes a name which does not belong to him, he will be restrained from doing this, if his so doing would be calculated to deceive (*f*). And a man may even Use of one's own name.

(*a*) See *Dorman (W. H.) & Co. Ltd.* v. *Meadows (Henkey) Ltd.*, [1922] 2 Ch. 332.

(*b*) *Blofield* v. *Payne*, 4 B & Ad. 410; *Rodgers* v. *Nowill*, 5 C. B. 109; *Reddaway* v *Banham*, [1896] A. C. 199.

(*c*) *Per* LINDLEY L. J, in *Reddaway* v. *Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639 [C. A.], at p. 644; *"Singer" Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376; *Montgomery* v. *Thompson*, [1891] A. C. 217; *Edge* v. *Niccolls*, [1911] A. C. 693; *Badische Aniline* v. *Farbenfabriken*, 6 Bom. L. R. 407; *Dorman & Co.. Ld.* v. *Meadows (Henry) Ld*, [1922] 2 Ch. 332; *Middlemas & Wood* v. *Moliver and Co*, *Ld.*, 38 R. P. C. 97; *Balladin and Alladin Firm* v. *Puranmal Balbehari Lall*, 8 Bur. L. T. 113; 30 I. C. 633.

(*d*) *Per* HALSBURY, L. C., in *Birmingham Vinegar Brewery Co*, v. *Powell*, [1897] A C. 710, at P. 711 (quoting from TURNER, L. J., in *Burgess* v. *Burgess*, 3 D. M. & G. 204); *Guimaraens (M. P.) & Son* v. *Foncea & Vasconcellos, Ltd.* 38 R. P. C. 388.

(*e*) *Turton* v. *Turton*, 42 Ch. D. 128 [C. A.].

(*f*) *F. Pinet et Cie* v *Maison Louis Pinet, Limited*, [1898] 1 Ch 179.

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be restrained from using his own name, if it is clearly proved that he is using it with the **fraudulent intent** of attracting the custom of a rival, but not otherwise. For primâ facie a man has a right to use his own name (*a*).

Illustrations.

Get up of goods.

(1) Actions have been brought successfully (*b*) by an inventor of metallic hones against another trader who wrapped his in envelopes resembling the plaintiff's (*c*); by the well-known makers of pocket-knives, J. Rodgers & Sons, against another firm who used their name and device with the addition of the word "Sheffield" (*d*); by the well-known makers of sewing machines against rivals who advertised and sold "S" sewing machines, by which name the plaintiffs' machines were well known in the trade (*e*): by makers of "Yorkshire Relish" against another firm who sold sauce in similar bottles by the same name (*f*); and by brewers at Stone of a drink known as "Stone Ale," against another firm of brewers who also manufactured ale at Stone and sold it as "Stone Ale" (*g*).

Similarity of name.

(2) Though the plaintiffs had for many years carried on business as steel manufacturers under this style of Thomas Turton & Sons, it was held they could not prevent a firm consisting of John Turton and his two sons from carrying on a similar business under the name of John Turton & Sons, that being a true description of the firm, and there being no evidence of any attempt to deceive the public (*h*); but where a person assumed as his name the name of a

(*a*) *Burgess* v. *Burgess*, 3 D. M. & G. 896.

(*b*) See the effect of the Trade Marks Act, 1919, (9 & 10 Geo. V. C. 79) s. 6.

(*c*) *Blofield* v. *Payne*, 4 B & Ad. 410.

(*d*) *Rodgers* v. *Nowill*, 5 C B 109 See *Madhanji Dharamsay Manufacturing Co, Ld.* v. *Genl. India Sg. Wg. and Manufacturing Co. Ld.* 41 Bom. 49.

(*e*) *"Singer" Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376.

(*f*) *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A. C. 710; *Sen* v. *E, S. Oakes*, 55 I. C. 560 F. B.

(*g*) *Montgomery* v. *Thompson*, [1891] A. C. 217.

(*h*) *Turton* v. *Turton*, 42 Ch. D. 128 [C. A.]; *Mancherji* v. *Franji*, 2 Bom. L. R. 1026; *Uberoi Ltd.* v. *Kerpal Singh*, 56 I. C. 709; *John Bright & Brothers Ld.* v. *John Bright (Outfitters) Ld.* 67 Sol. Jo. 112 [C. A.].

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manufacturer of boots and shoes with the object of making boots and shoes and passing them off as those of the old-established firm, he was restrained from using the name in connection with the sale of boots and shoes (*a*).

(*a*) *F. Pinet et Cie* v. *Maison Louis Pinet Limited*, [1898] 1 Ch. 179, *National Bank of India* v. *National Bank of Indore*, 24 Bom. L R 1081 ; *Oriental Gov. Security Life Assurance Co., Ld.* v. *Oriental Assurance Co. Ld.*, 40 Cal. 570 ; and see the still stronger case where the plaintiff had no place of business here yet was granted an injunction [*Poiret* v. *Poiret, (Jules), Limited, & Nash*, 37 R. P. C. 177].

CHAPTER VI.

OF DECEIT OR FRAUD.

ART. 75.—*Definition of Fraud.*

Fraud consists of a false representation made with intent to deceive and to be acted upon, and either known by the party making it to be false, or made without belief in its truth, or recklessly without caring whether it be true or false.

The general rule of law is, that mere silence with regard to a material fact will not give a right of action for fraud, and no action can be maintained on deceit which does not in fact deceive (*a*).

Elements of actionable deceit.

The essentials of actionable deceit are (1) a false statement of fact, (2) made recklessly or with knowledge of its falsity; (3) with intent plaintiff shall act on it (*b*); (4) that plaintiff has so acted (*c*); and (5) that plaintiff thereby suffered damage.

When silence amounts to fraud.

Though it is generally true to say that there must be active fraud, nevertheless there may be statements of a fragmentary character, true as far as they go, but so distorted as to convey a wholly erroneous impression; and statements of that kind made with intent to deceive may amount to fraudulent statements although literally true. "Supposing you state a thing partially, you make as much a false statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report and leave out a third passage which qualifies them, that is an actual mis-statement" (*d*).

(*a*) *Horsfall* v. *Thomas*, 2 H. & C. 90.

(*b*) *Peek* v. *Gurney*, L. R 6 H. L 377; *Tackey* v. *Mc Bain*, [1912] A. C. 186.

(*c*) *Smith* v. *Chadwick*, L R. 9 App Cas. 187.

(*d*) *Per* JAMES, L.J., in *Arkwright* v. *Newbold*, 17 Ch. D. 301, at p. 318.

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Actual fraud necessary.

The leading case of *Derry* v. *Peek* (*a*) establishes that, in an action of deceit, the plaintiff must prove actual fraud; he may prove it by showing that the false representation was made knowingly, or without belief in its truth, or recklessly, not caring whether it was true or false. But a false statement made through carelessness, and **without reasonable ground for believing it to be true, does not amount to fraud**; and if the jury finds that it was made in the *honest belief* that it was true, the defendant will not be liable in an action of deceit, however unreasonable his belief may have been. **No amount of negligence can amount to fraud.**

(1) The false statement must be of a fact (*b*) not a mere promise; but a statement of opinion if wilfully false is actionable as a tort (*c*).

(2) It must be made recklessly, that is, without an honest belief in the truth of the statement (*d*), but not merely negligently (*e*).

(3) The right of action is confined to the person intended to act on the statement (who need not be the person to whom the statement is made (*b*), others must act at their own risk. But purchasers of shares relying on a prospectus have a good cause of action (*f*)

(4) It is essential that the plaintiff be influenced by the untrue statement (*g*) and that he acted as a result of it (*h*). But no action lies if the plaintiff is not in fact deceived (*i*), though the fact that the plaintiff has been negligent in so acting on the untrue statement is no defence (*j*).

(*a*) 14 App. Cas. 337; and see *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 [C. A.].

(*b*) *Langridge* v. *Levy*, 2 M & W. 519.

(*c*) *Anderson* v. *Pacific Insurance Co* L. R. 7 C. P. 69.

(*d*) *Derry* v *Peek*, *supra*.

(*e*) *Le Lievre* v. *Gould*, *supra*; *Glasier* v. *Rolls*, 62 L. T. 133 [C. A.].

(*f*) *Andrews* v. *Mockford*, [1896] 1 Q. B. 372; *Richardson* v. *Silvester*, L. R. 9 Q. B. 34.

(*g*) *Edgington* v. *Fitzmaurice*, 29 Ch. D. 485.

(*h*) *Macleay* v. *Tait*, [1906] A. C. 24.

(*i*) *Horsfall* v. *Thomas*, 1 H. & C. 90.

(*j*) *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Wells* v. *Smith*, [1914] 3 K. B. 722.

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(5) The cause of action is not the deceit but the detriment suffered by the plaintiff, hence damage must be proved (*a*).

(6) Where the defendants combined together and got the plaintiff's property fraudulently transferred, damages were held to be recoverable on that account not only from the prime mover of the transaction, but likewise from his own collecting agent as well as from the purchaser (*b*).

No intent to benefit.

(7) The false statement need not be made with intent to benefit the defendant. It is sufficient that it was made with intent to deceive, and was followed by loss which a reasonable man might have contemplated. Thus, where a foolish practical joker told the plaintiff that her husband had had both his legs smashed in a railway accident and that she was to go to him at some distance immediately with appliances for bringing him home, he was held liable for the nervous shock and subsequent ill-health of the plaintiff (*c*).

(8) Where a gunmaker sold a gun to B., for the use of C., fraudulently representing it to be sound, and the gun burst while C. was using it, and he was thereby injured :— *Held*, that C. might maintain an action of fraud against the gun-maker, as the statement with regard to the soundness of the gun, though made to B., was intended to be acted upon, and was acted upon by C. (*d*).

Fraud of agent.

(9) A principal is generally liable for the fraud of his agent or servant acting within the scope of, and in the course of, his employment (*e*). In *Lloyd* v. *Grace, Smith & Co.* (*f*), a solicitor's managing clerk, having authority to transact conveyancing business for the firm, received from a client the title deeds of some property for negotiating

(*a*) *Dobell* v. *Stevens*, 3 B. & C 623.

(*b*) *Wharton* v. *Muna Lal and Others*, 6 B. H C. R (O C. J.) 98.

(*c*) *Wilkinson* v. *Downton*, [1897] 2 Q B 57.

(*d*) *Langridge* v. *Levy*, 2 M & W. 519

(*e*) See Art. 27 *ante*.

(*f*) *Lloyd* v. *Grace, Smith & Co*, [1911] A C. 716; 81 L. J. K. B. 1140; 107 L T. 531 (overruling *the dicta* of Lord BOWEN in *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.*, 18 Q. B. D. 714, and of Lord DAVEY in *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439). In this case *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex 259, was said to be not an authority for the proposition that a principal is not liable for the fraud of his agent, unless committed for the benefit of the principal.

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a sale of it, fraudulently procured her execution of an instrument, being in fact a conveyance to himself, which the client supposed was only a formal paper, and dealt with the property for his own purpose:—*Held*, this was a fraud in the course of employment, and the principal was answerable. In *Cornfoot* v. *Fowke* (*a*), the question arose whether a principal is liable for the act of his agent who makes, on behalf of his principal but without his authority, a false statement which he believes to be true, but which the principal would have known to be untrue. A house agent represented to an intending lessee that there was no objection to a house. There was, in fact, a brothel next door. The principal knew of this; the agent did not:—*Held*, the principal was not liable in an action of fraud. The agent was not fraudulent, because he did not know that the statement was untrue, and the principal had not himself committed a fraud, because he did not make the statement or authorise the agent to make it. How then could the principal be liable for a fraud which neither he himself nor his agent had committed?

(10) Where, however, a principal intentionally keeps an agent ignorant of a fact, intending that he shall misrepresent it, and the agent does so, the principal is liable for fraud. His conduct in that case is as fraudulent as if he had himself made the misrepresentation with knowledge of its falsity (*b*).

(11) In India, misrepresentations made or frauds committed by agents acting in the course of their business for their principals have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made or frauds committed by agents in matters which do not fall within their authority do not affect their principals (*c*).

(*a*) 6 M. & W. 358.

(*b*) *Ludgater* v. *Love*, 44 L. T. 694 [C. A.]

(*c*) Section 238, Indian Contract Act (IX. of 1872). The ruling in *Lloyd* v. *Grace, Smith & Co.*, deserves special note in the interpretation of this section. In deciding cases under this section, the Privy Council and the courts in India have followed the principle laid down by English cases (*e.g.*, *Barwick* v. *English Joint Stock Bank*, *supra*: *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.*, *supra*), and held that the liability of the principal for the acts of his agent was limited to the circumstance of such acts being not only in the course of business, but likewise for the benefit of the

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ART. 76.—*Statements as to Credit.*

Where the fraudulent statement consists of a false representation as to the conduct, credit, ability or dealings of another, with intent to procure for him credit, money or goods, no action will lie unless the representation is in writing signed by the defendant (*a*), consequently an incorporated bank is not liable for a fraudulent misrepresentation made by a manager (*b*).

ART. 77.—*The Liability of Directors and Promoters of Companies.*

Directors and promoters of companies who are parties to the issuing of any prospectus inviting subscriptions to the shares, debentures or debenture stock of a company, are liable to persons who subscribe on the faith of such prospectus for untrue statements therein made **without reasonable ground** (*c*).

principal, and that when the agent acted in his own interests and for his own private and improper ends, the employer would not be liable for the consequences (see *Bombay Burma Trading Corporation, Limited* v. *Mirza Mahomed Ally and the Burma Co., Limited*, 4 Cal. 116; 5 I. A 130; *Motilal Ghose* v. *Secretary of State for India*, 36 Cal. 647; *McLoren Morrison* v. *S. Vereshoyle*, 6 C. W. N. 429). In this last-mentioned case it was expressly said that this exposition of the principal's liability for his agent's torts was adopted by the Indian legislature in enacting the above section. In the light of the decision in *Lloyd's Case*, the words of the section have rightly been interpreted in the wider sense (*Dinabandhu Saha* v. *Abdul Latif Molla*, 50 Cal 258).

(*a*) 9 Geo. 4, c. 14, s. 6. It will be observed that the signature must be that of the defendant himself, and not of an agent or partner [*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301 (Ex Ch.): *Williams* v. *Mason*, 28 L. T. 232].

(*b*) *Bishop* v. *Balkis Consolidated Co.*, 25 Q. B. D. 512; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560.

(*c*) Section 84 of the Companies (Consolidation) Act, 1908, being a re-enactment of the Directors Liability Act, 1890. See also Indian Companies Act, (VII of 1913), S. 100.

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Comment.

The decision in *Derry* v. *Peek* (*a*), that if a person issuing a prospectus had an honest belief in its truth, he could not be made liable in an action for deceit, however careless he may have been, and however slender the grounds of his belief, led to an amendment of the law by which Parliament created a statutory liability to pay compensation for untrue statements in prospectuses, **without proof of actual fraud,** unless the defendant had reasonable grounds for believing the statement to be true, or can establish one of the other defences allowed by the Act (*b*). It is now enacted that where a prospectus invites persons to subscribe for shares in, or debentures or debenture stock of, a company, every director and promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to persons who subscribe for any shares, debenture, or debenture stock, on the faith of such prospectus, for loss sustained by *any untrue statement* in the same, *unless it is proved either*—

(*a*) that the defendant had *reasonable ground to believe*, and did believe, that it was true ; or

(*b*) that the statement fairly represented some statement in the report of an expert (whom the defendant believed to be competent), or in a public or official document ; or

(*c*) that the prospectus was issued without the authority or consent of the defendant, and that he took the proper steps indicated in the Act to make this known (*b*).

It will be perceived that this statute really creates a new statutory duty, the breach of which is a tort, but that it makes no alteration in the common law action for deceit. In short, it makes directors and promoters liable for carelessness as well as for fraud (*c*). But the liability is none the less based on tort, and so the right dies with the possessor (*d*).

(*a*) 14 App. Cas. 337.

(*b*) Section 84 of the Companies (Consolidation) Act, 1908, being a re-enactment of the Directors Liability Act, 1890. See also Indian Companies Act. (VII of 1913), S. 100.

(*c*) See *Dovey* v. *Cory*, [1901] A. C. 477 ; *Préfontaine* v. *Grenier*, [1907] A. C. 101 [P. C.].

(*d*) *Geipel* v. *Peach*, [1917] Ch. 108.

CHAPTER VII.

OF NEGLIGENCE.

ART. 78.—*Definition.*

(1) Negligence consists in the omission to do something which a prudent and reasonable man would do, or the doing something which a prudent and reasonable man would not do (*a*).

(2) Negligence is actionable whenever, as between the plaintiff and the defendant, there is a duty cast upon the latter not to be negligent, and a breach of this duty which causes damage to the plaintiff (*b*).

It will be seen that there are three points to be established to found an action for negligence :

(i) A duty to take care.
(ii) A breach of that duty—negligence.
(iii) Damage as the natural and probable consequence.

Duty to take care.

The duty to take care arises out of many relations equally impossible of strict definition or of enumeration in a short compass.

Some of the typical cases are dealt with in the following articles, but the list is not exhaustive. It must not be forgotten, however, that though there is a vast variety of circumstances in which there is a duty to take care, *where there is no duty there can be no action for negligence.*

The student should refer back to Part I., Chapter III., where some of the cases in which it has been held that there is no duty to take care are considered (*c*). Other cases will be found in the following Articles.

(*a*) *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784.

(*b*) See *per* Lord HERSCHELL, *Caledonian Rail Co.* v. *Mulholland*, [1898] A. C. 216 at p. 225 ; *Swami Naidu* v. *Subramanya*, 2 M. H. C. R. 158 (following *Swan* v. *North British Australian Co.*, 7 H. & N. 603) ; *B. E. Cates* v. *Mongini Bros.*, 19 Bom. L. R. 778 ; 42 I. C. 82.

(*c*) See especially *Winterbottom* v. *Wright*, 10 M. & W. 109 ; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733 ; *Le Lievre* v. *Gould*, [1893] I. Q. B. 491 [C. A.], *ante*, Art. 17 ; *Caledonian Rall. Co.* v. *Mutholland* [1798] A. C. 216 ; *Butler* v. *Fife Coal Co.*, [1912] A. C. 159.

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What is negligence.

It will be observed that negligence may consist in either isfeasance, *i.e.*, doing that which a prudent and reasonable an would not do ; or in nonfeasance, *i.e.* omitting to do mething which a prudent and reasonable man would do. egligence is judged by the standard of prudence of an dinary reasonable man, and if a person omits some pre- ution, which a person of ordinary intelligence and udence would take, he is negligent, although he may him- lf honestly think it unnecessary to take such a precaution. o a person may be negligent in taking care of another's oney entrusted to him for that purpose—though he takes much care of it as he takes of his own (*a*).

Degree of care required depends on circumstances.

It must be remembered that the degree of care which a erson is bound to use in regard to others is relative, and at in deciding whether a given act is, or is not, negligent, e circumstances attending each particular case must be lly considered. "A man," it has been said, "who traverses crowded thoroughfare with edged tools, or bars of iron, ust take especial care that he does not cut or bruise others ith the things he carries. Such person would be bound to eep a better look out than the man who merely carried an mbrella ; and the person who carried an umbrella would e bound to take more care in walking with it than a person ho had nothing at all in his hands."

Want of skill.

A person who undertakes something requiring special nowledge or skill is negligent if by reason of his not ossessing that knowledge or skill he bungles, although he oes his best (*b*).

So a person who drives a horse or a motor car is negli- ent if he does something which a prudent person having easonable skill as a driver would not do (*c*) ; and a person, ractising surgery without the ordinary skill and knowledge f a surgeon, is negligent if he blunders by reason of his ant of knowledge and skill (*d*).

But no person is required to have extraordinary foresight, rudence or skill, and so long as one uses ordinary skill nd acts with reasonable prudence, he cannot be said to be egligent.

(*a*) *Doorman* v. *Jenkins*, 2 A & E. 256 ; *Meux* v. *Great Eastern Rail Co.*, [1895] 2 Q. B. 387 [C. A.].

(*b*) *Heaven* v. *Pender*, 11 Q. B D. 507.

(*c*) *Sorabji Hormusji* v. *Jemshedji Marmanji*, 38 Bom 552.

(*d*) *Gladwell* v *Steggall*, 5 Bing. N. C. 733. See *Pareira* v. *Gonsalves*, 8 Bom. L. R. 93.

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So in the case of a solicitor, erroneous judgment upon a new point of law or upon a difficult question of construction is not negligence, but ignorance of practice and mismanagement of the preparation of a case for trial is, for these are matters in which a solicitor of ordinary intelligence, and having that knowledge of his professional duties which all solicitors should have, ought not to make a mistake (*a*).

ART. 79.—*Duty of Persons using Highway to take Care.*

Every person using a highway or other place frequented by the public owes a duty to take care as regards the persons and property of others. So if a person driving or riding on a highway *by his negligence* runs over, or otherwise damages, another person on the highway, an action will lie for the damage suffered. So, also, persons in charge of ships at sea or on rivers are bound to use care not to do damage to the persons or property of others (*b*).

This rule does not depend on the special nature of highways. It applies generally to all places where persons are likely to meet others. As Lord BLACKBURN says: "Those who go personally or bring property where they know that they or it may come in collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such a collision" (*c*). So the rule applies equally to persons on railway

(*a*) See *Godefroy* v. *Dalton*, 6 Bing 460, 468; *Mukdum Shah* v *Plowden*, 20 P. R. 1874; *Buldeo Misser* v. *Syed Ahmed*, 15 W. R. 143; *Fletcher & Son* v. *Jubb, Booth and Helliwell*, [1920] 1 K B. 275 (allowing claim to be barred by time).

(*b*) See the rule stated more broadly by Lord BLACKBURN in *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, 3 App. Cas. 1155. at p. 1206; and by Lord ESHER more broadly still in *Heaven* v. *Pender*, 11 Q. B. D. 503 [C. A.]. In the latter case COTTON and BOWEN, L. J. J., dissented from Lord ESHER's proposition, and Lord ESHER himself explained it in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497 [C. A.].

(*c*) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, 3 App Cas 1155, at p. 1206.

stations, in shops, or any other places where people congregate. If, for instance, the driver of an engine crossing at midnight an unfenced level-crossing laid across a public high-way does not exercise more than the ordinary care and in consequence a motor car passing on the high-way is damaged, the body in charge of the railway administration is liable (*a*). Art. 79.

Art. 80.—*Duty of Carriers of Passengers.*

Carriers of passengers by any sort of carriage or conveyance owe to passengers a duty to take reasonable care to carry them safely. This duty arises not from contract but from the fact that the passenger is being carried with the knowledge and consent of the carrier; and it applies whether the carriage is gratuitous or for reward (*b*), but not if the passenger is a mere trespasser (*c*).

This rule is the foundation of the liability of railway companies to their passengers. That the duty is one arising quite **independently of any contract** between the carrier and the passenger is laid down in *Kelly* v. *Metropolitan Rail. Co.* (*d*), and is well shown by the following illustrations. It must be noted that a carrier of passengers (unlike a common carrier of goods) does **not warrant** the safety of the passenger (*e*). He is only liable for negligence (*f*), and

(*a*) *Abdul Latiff* v. *Pauling and Co., Ltd.*, 19 Bom. L. R. 167; 38 I. C. 773. See also *Bengal Provincial Railway Co.* v *Gopi Mohon Singh*, 41 Cal. 308; *Mercer* v *South Eastern and Chatham Railway Companies Managing Committee*, [1922] 2 K. B. 549.

(*b*) *Harris* v *Perry & Co.*, [1903] 2 K. B. 219; *Grand Trunk Ry. Co. of Canada* v. *A. N. Robinson*, [1915] A. C. 740; 31 I. C. 68 P. C.

(*c*) *Grand Trunk Rail. Co.* v. *Barnett*, [1911] A. C. 361 [P. C.]; *Lygo* v. *Newgold*, 9 Ex 302.

(*d*) [1895] 1 Q. B 944 [C. A.] explaining *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134 [C. A.].

(*e*) *East India Rail. Co.* v. *Kally Das Mukerjee*, 26 Cal. 465: on appeal, 28 Cal. 401; 28 I. A. 144.

(*f*) *Woodhouse* v. *C. & S. E. Railway*, 9 W. R. 73; *Kessowjee Issur* v. *G. I. P. Railway*, 9 Bom. L. R. 671; *Bromley* v. *G. I. P. Railway*, 24 Bom 1; *Dulabhji* v. *G. I. P. Railway*, 12 Bom. L. R. 73.

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if an injury happens to the passenger **without negligence there is no liability** (*a*).

Illustrations.

(1) An infant over three years of age whilst travelling by railway with its mother (with the knowledge and implied consent of the company's servants, but without a ticket) was injured by the negligence of the railway company. The company were held liable though there was no contract to carry the infant (*b*).

(2) But where a person was injured whilst travelling on the footboard of a train in defiance of a byelaw and without the permission of the company, so that he was a mere trespasser, it was held that the company owed him no duty and he had no cause of action (*c*).

(3) A passenger in a railway train was injured in an accident caused by the breaking of the tyre of a wheel of the carriage in which he rode. The defendants had used all diligence in providing a safe carriage and examining it before starting and in the course of the journey. There being no negligence the company were not liable (*d*).

See also *Harris* v. *Perry & Co.* (*e*), cited *ante*, Art. 18.

(4) Similarly, where the train was allowed to overshoot the station, and owing to insufficiency of light the plaintiff fell down and was seriously injured, and likewise the door of a railway carriage was left unfastened and a person received injuries in consequence, the railway company was held liable for negligence (*f*).

(5) But where a passenger was killed by an explosion caused by the illegal introduction of some fireworks into the railway carriage, the company were exonerated from liability in the absence of negligence, as it was not the duty of the company to search every parcel carried by passengers (*g*).

(*a*) *Readhead* v. *Midland Rail. Co.*, L. R. 4 Q. B. 379 [Ex. Ch]; *Newberry* v. *Bristol Tramways Co.* 107 L. T. 801.

(*b*) *Austin* v. *Great Western Rail. Co*, L. R 2 Q. B. 442.

(*c*) *Grand Trunk Rail. Co.*, v. *Barnett*, [1911] A C. 361 [P. C.].

(*d*) *Readhead* v. *Midland Rail. Co.*, L. R. 4 Q B. 379.

(*e*) [1903] 2 K. B. 219 [C. A.].

(*f*) *Woodhouse* v. *C. & S. E. Railway*, *supra*; *Bromley* v. *G. I. P. Railway*, *supra*; *G. I. P. Railway* v. *Kessowji*, 7 Bom. L. R. 119 (on appeal, see 9 Bom. L. R. 671).

(*g*) *East India Rail. Co.* v. *Kalidas Mukerjee*, 28 Cal. 401 P. C. See also *Shiam Narain* v. *B. B. & C. I. Ry. Co.*, 41 All. 488.

Art. 81.—*Duty of Occupiers of Land and Houses to Persons coming by Invitation, etc.*

(1) An occupier of land, buildings or structures owes to persons resorting thereto in the course of business upon his invitation, express or implied, a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know (*a*).

(2) An occupier of land or buildings owes to bare licensees and guests a duty not to set a trap, *i.e.*, not to put any unexpected danger there without warning the licensee or guest (*b*).

Persons coming by invitation.

The duty owed to persons coming in the course of business by invitation applies to all persons who go on business which concerns the occupier, or in which he is even indirectly interested. There need not be an express invitation. An invitation is implied when the persons come in the ordinary course of business. It will be noticed that the rule of liability does not throw on the occupier an absolute duty to insure the safety of the premises. So he is not liable for some latent defect in a structure which he did not know of and could not have provided against by taking reasonable care (*c*). It is only a duty to **use reasonable care to prevent damage from unusual danger,** *i.e.*, from dangers which would not usually be found on premises of the kind (*d*). Persons cannot complain of dangers which they would expect to find on premises of the kind.

Duty as between landlord and tenant.

As between landlord and tenant the duty to repair the demised premises depends entirely on the contract between the parties, and apart from contract the landlord owes the tenant no duty to repair or not to let the premises in a

(*a*) *Indermaur* v. *Dames*, L. R. 1 C. P. 274; affirmed 2 C. P. 311 [Ex. Ch.]; *Elliott* v. *Roberts, Limited*, [1916] 2 K. B. 518 [C. A.].

(*b*) See *ibid.*, and *Gautret* v. *Egerton*, L. R. 2 C. P. 371; *Kimber Gas Light & Coke Co.*, [1918] 1 K. B. 439 [C. A.].

(*c*) *Norman* v. *G. W. Rail., Co.*, [1915] 1 K. B. 584; *Pritchard* v. *Peto*, [1917] 2 K. B. 173.

(*d*) See *Brannigen* v. *Harrington*, 37 T. L. R. 349 (case of a restaurant).

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dangerous condition. Hence, if a landlord lets a house in a dangerous condition, he is not liable to the tenant or to a person using the premises by invitation of the tenant for any injuries happening during the term due owing to the defective state of the house (*a*).

Accordingly when a landlord contracted with his tenant to repair a defective house, but failed to do so, and the wife of the tenant was injured by reason of the defective state of the house, it was held that she had no cause of action, as she was a stranger to the contract (*b*), and the defect being obvious there was no trap for which the landlord could be made liable in tort (*c*).

So, too, when an owner of a building let out in flats or separate tenements keeps possession of the common staircase, he owes no duty to his tenants (apart from contract) with regard to lighting and repairing the staircase, and the guests of his tenants or persons coming on business with them have no better rights than the tenants themselves. Accordingly, if such a person is injured in consequence of the dangerous condition of the staircase he has no cause of action against the landlord (*d*), unless (1) the landlord has taken upon himself, by contract with the tenant, the obligation of repairing, in which event, as he must contemplate that the staircase will be used by persons having business with the tenants, he owes them a duty to keep it in a reasonably safe condition (*e*), or (2) the defect is concealed and constitutes a trap.

(*a*) *Lane* v. *Cox*, [1897] 1 Q. B. 415 [C. A.]. As to the implied warranty in the case of a letting of a *furnished* house, see *Smith* v. *Marrable*, 11 M & W. 5; and *Wilson* v. *Finch Hatton* 2 Ex. D. 336.

And as to the statutory obligation to repair in the case of small houses see the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7 c. 44), ss. 14, 15.

(*b*) *Cavalier* v. *Pape*, [1906] A. C. 428.

(*c*) *Lucy* v. *Bawden*, [1914] 2 K. B. 318; *Norman* v. *Great Western Rail. Co.*, [1915] 1 K. B. 584 [C. A.]; *Dobson* v. *Horsley*, [1915] 1 K. B. 634 [C. A.].

(*d*) *Hugget* v. *Miers*, [1908] 2 K. B. 278 [C. A.]; and compare *Ivay* v. *Hedges*, 9 Q. B. D. 80. It is difficult to reconcile *Hargroves*, *Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472, with these cases.

(*e*) *Miller* v. *Hancock*, [1893] 2 Q. B. 177 [C. A.]. This case in so far as it is inconsistent with *Indermaur* v. *Dames*, *supra* was overruled by *Fairman* v. *Perpetual Investment Building Society* [1922] W. N. 304; 92 L. J. K. B. 50.

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Licensees and guests.

Bare licensees, *i. e.*, persons who come not for any business in which the occupier is interested, but merely by permission for their own purposes, and guests, are in a somewhat different position. Their position is analogous to that of a person who receives a gift. He is only entitled to use the place as he finds it, and cannot complain, unless there is some design to injure him or the occupier has done some wrongful act, such as digging a trench on the land or misrepresenting its condition or anything equivalent to laying a trap for the unwary. A giver of a gift is not responsible for the insecurity of the gift unless he knows its evil character at the time and omits to caution the donee. So, too, in the case of a person to whom permission to go on land is given, he cannot complain unless there is something like fraud in the gift (*a*). But where the license is limited in area the licensor is under no liability to warn a licensee who trespasses on to other ground (*b*).

Trespassess.

Trespassers are at any rate in no better position than bare licensees, and, as no permission is given, there can be no duty to give warning of danger. And he cannot maintain an action where his unlawful act or conduct is connected with the harm he suffers as part of the same transaction, *e g.*, falling into a hole in the land trespassed on. But even a trespasser has a right of action if he is injured whilst trespassing, by some wrongful act of the occupier, as for instance, if he is assaulted or is injured by something which the occupier of the land has put there for the purpose of injuring him (*c*). And if a person knows that others are in the habit of trespassing or are likely to trespass, he may be liable if he leaves about dangerous things which will act as allurements and so induce people to trespass, and does not take proper means to prevent consequent damage (*d*), *e.g.*, spring guns, and other infractions of statutes as to fencing, barbed wire, and highways, or with a knowledge he is there (*e*).

(*a*) See the judgment of WILLES J., in *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

(*b*) *Jenkins* v. *Great Western Rail. Co.*, [1912] 1 K. B. 525.

(*c*) *Bird* v. *Holbrook*, 4 Bing. 628.

(*d*) *Cooke* v. *Midland Great Western Railway*, [1909] A. C. 229; *Latham* v. *R. Johnson and Nephew, Limited*, [1913] 1 K. B. 398.

(*e*) *Petrie* v. *Rostrevor Owners*, [1898] 2 Ir. R. 556.

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The judgment of WILLES J., in the two leading cases of *Indermaur* v. *Dames* and *Gautret* v. *Egerton*, should be carefully studied.

Illustrations.

Persons coming by invitation.

(1) Upon the defendant's premises was a trap-door on the level of the floor used for raising and lowering bags of sugar from one floor to another. It was not necessary that it should be unfenced when not in use. The plaintiff, a journeyman gasfitter employed by persons who had fixed a gas regulator upon the defendant's premises, came to test the apparatus. Whilst so engaged he fell through the trap-door and was injured. The trap-door at the time was not in use and was not fenced. There was no negligence on his part :—*Held*, that he was on the premises on business in which the defendant was interested, and that the defendant was liable as the danger was an unusual danger, and the defendant had neglected his duty to take reasonable care by fencing it or warning the plaintiff (*a*).

(2) The plaintiff, a licensed waterman, having complained to the person in charge that a barge of the defendant's was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger :—*Held*, that the defendants were liable (*b*).

(3) The defendant engaged a contractor to erect a grand stand for viewing races. The plaintiff paid for a seat on the grand stand. Owing to the negligence of the contractor the stand was defective, and it fell and the plaintiff was injured. The defendant was liable, although neither he nor his servants were personally negligent. It was their duty to see that the stand was reasonably safe (*c*).

(4) Workmen were allowed to cross a piece of vacant land to get to some docks. On this land were canals and bridges. One of the bridges was out of repair, and a workman when crossing by it fell into a canal and was drowned. In an action brought by his widow it was held that as the workman was a bare licensee he must take the place as he found it, and as there was no trap the defendant was not liable (*d*).

(*a*) *Indermaur* v. *Dames*, L. R. 1 C. P. 274; affirmed L. R. C. P. 311 [Ex. Ch.]; *Kimber* v. *Gas Light and Coke Co.*, [1918] 1 K. B. 439.

(*b*) *White* v. *France*, 2 C. P. D. 308.

(*c*) *Francis* v. *Cockrell*, L. R. 5 Q. B. 184.

(*d*) *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

(5) But where children were bare licensees and in playing on defendant's land one was injured by one of a heap of stones there falling on her hand, it was held that there being no concealed danger there was no duty to warn and consequently no liability (*a*). And where children repeatedly warned and sent away by the servants of a railway company to prevent them coming on the company's premises and playing with a moving staircase, it was held that their return after such warnings constituted them trespassers with no right of action for resultant injury (*b*).

(6) In *Lowery* v. *Walker* (*c*) the defendant was a farmer who put in a field a horse which he knew to be savage. The defendant had tacit permission to cross the field, and whilst doing so was bitten by the horse. This was in effect setting a trap.

Trespassers.

(7) If a person sets a spring gun on his land with the intention that it shall go off and cause injury to trespassers, he is liable for the intentional wrong so done. What he does really amounts to an assault (*d*). If he leaves dangerous things like guns about he must take proper precautions to prevent their doing damage (*e*); and *a fortiori* he is liable if he contrives that they shall do damage.

(8) The plaintiff occupied a house near the land of the first defendant, and had been in the habit of crossing the land on his way to and from his place of business. Once in returning at night he fell into a hole dug during the day across the path over the land by an employee of the second defendant, the lessee of the land, and kept unfenced and unlighted. The second defendant, as the employer, was made liable for damages (*f*).

(9) A police constable, seeing the door of the defendant's warehouse open after dark, and in order to see that everything was right, and in the execution of his duty, entered the warehouse and injured himself by falling into an unfenced sawpit inside. It was held that he had no legal right to enter, being neither an invitee nor a licensee, but

(*a*) *Latham* v. *Johnson & Nephew Ltd.*, [1913] 1 K. B. 398.
(*b*) *Hardy* v. *Central London Rail. Co.*, [1920] 3 K. B. 459.
(*c*) [1911] A. C. 10.
(*d*) *Bird* v. *Holdbrook*, 4 Bing. 628.
(*e*) See *Dixon* v. *Bell*, 5 M. & S. 198.
(*f*) *Evans* v. *Trustees of the Port of Bombay*, 11 Bom. 329.

Art. 81. that even assuming he had, the defendant, was under no duty to him to make the place safe for him or to warn him of the danger (*a*).

ART. 82.—*Duty of Bailees of Goods.*

Bailees of all kinds, including carriers, owe to their bailors a duty to take care of the goods and chattels bailed. The degree of care required varies with the nature of the bailment (*b*).

All kinds of bailees of goods and chattels are bound at least to take reasonable care of the goods bailed to them, though, generally speaking, greater care is expected of one who derives benefit from the bailment, such as a borrower of goods, or a pawnbroker or hirer, or a ware-houseman who is paid for keeping them, than from one who has the custody of goods for the benefit of the bailor only, such as one who gratuitously undertakes their custody for the convenience of the owner (*c*).

The topic of the liability of carriers and other bailees for the safety of the goods entrusted to them is too large to be dealt with fully in this Work, and it is only necessary here to refer the student to the cases cited in a previous Article, which show that the liability is one in tort, arising by reason of the bailment and quite apart from contract (*d*). It must be remembered, however, that the liability of a bailee may be modified by contract between the parties and where goods are carried under an express contract the common law liability of the bailee may be thereby much enlarged or curtailed.

Common carriers.

At common law a common carrier, that is, a person who holds himself out as carrying on the business of carrying the goods of all and sundry from place to place, is liable for any loss of, or injury to, the goods unless he can show that the loss was due to the act of God or the King's enemies, or to some inherent vice or unfitness to be carried of the goods themselves. A licensee of a ferry is a common

(*a*) *Great Central Rail. Co.* v. *Bates*, [1921] 3 K. B. 578.

(*b*) See *Coggs* v. *Bernard*, 1 Sm. L. C. 173. See Indian Contract Act, s. 151.

(*c*) See *ante*. Art. 18.

(*d*) See *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56 [C. A.]; and *Meux* v. *Great Eastern Rail Co.*, [1895] 2 Q. B. 387.

carrier (*a*). A carrier of goods by sea is under the same liability, as also is an innkeeper (*b*). The common law liability in all these cases has to some extent been modified by statute (*c*), and may always in any particular case be modified by agreement between the parties Bailees who are under this special liability are sometimes (though not quite accurately) spoken of as "insurers."

The Indian Contract Act (IX of 1872) was not intended to deal with common carriers. The obligation imposed by law on common carriers has nothing to do with contract in its origin, but it is a duty cast upon them by reason of their exercising a public employment for reward (*d*). The relative rights and liabilities of common carriers in India are governed by the principles of the English common law as modified by the Carriers Act (III of 1865). A common carrier in India is subject to two distinct classes of liability, the one for losses for which he is liable as an insurer, the other for losses for which he is liable under his obligation to carry safely (*e*). The Carriers Act of 1865 has in some degree modified this position. The effect of ss. 6, 8 and 9 of the Carriers Act is that the liability of a common carrier for the loss of goods, not being of the description contained in the Schedule to the Act, may be limited by special contract signed by the owner, save where such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants (*f*). A carrier can exempt his liability for negligence of his

(*a*) *Maung Po Thaw* v. *Harmdi Mihtay*, 3 U. B. R. 120; 50 I. C. 562.

(*b*) See *B. I. S. N. Co., Ld.* v. *Alibhai Mahomed*, 62 I. C. 378; *Kariadan Kumber* v. *British India Steam Navigation Co., Ld.*, 38 Mad. 941.

(*c*) See notes to *Coggs* v. *Bernard* in 1 Sm. L. C. 173. As to innkeepers, see *Cally's Case* and notes in 1 Sm. L. C. 119.

(*d*) *Irrawadi Flotilla Co.* v. *Bhagwan Das*, 18 Cal. 620; 18 I. A. 121; *Maladi Sathalingam* v. *Ramjam Lallju Sajan*, 14 Bom. L. R. 77; *Great Indian Peninsula Rail. Co.* v. *Raisett Chandswell*, 19 Bom. 165.

(*e*) See *Akhil Chandra* v. *India General Navigation Ry. Co.*, 21 C. L. J. 565; 29 I. C. 260; *Maung Po Thaw* v. *Harmdi Mihtay*, 3 U. B. R. 120; 50 I. C. 562; *Ramjash Agarwal* v. *Indian General Navigation and Railway Co. Ld.*, 22 C. W. N. 310; 41 I. C. 387.

(*f*) *British and Foreign Marine Insurance Co.* v. *India General Navigation and Rail. Co. Limited*, 38 Cal. 28; *Irrawadi Flotilla Co.* v. *Bhagwan Das, supra*; *Indian Central Steam Navigation Co. Ld.* v. *Gopal Chandra Guin*, 41 Cal. 80.

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servants by clear and express contract (*a*). The Railways Act (IX of 1890) reduced the responsibility of carriers by railway in India to that of bailees (*b*), and it lies on the railway company to show that the loss or damage occurred under circumstances which would exempt a bailee from responsibility (*c*).

ART. 83.—*Duty to take Precautions with regard to things Dangerous in themselves.*

(1) In the case of articles dangerous in themselves such as loaded firearms, poisons, explosives and other things *ejusdem generis*, there is a peculiar duty imposed on those who send forth, make or leave about such articles to take precautions that they shall not do damage to persons who may come in contact with them (*d*).

(2) A person who without due warning supplies to others for use an instrument or thing which *to his knowledge*, from its construction or otherwise, in such a condition as to cause danger not necessarily incident to the use of such instrument or thing is liable if damage is caused thereby (*e*).

(*a*) *Shaik Mahamad Rowthar* v. *British India Steam Navigation Co.*, 32 Mad. 95 ; *Hajee Ismail Sait* v. *Massageries Maritimes Co.*, 28 Mad. 400 ; *The Madras and Southern Mahratta Ry. Co. Ld.* v. *Mattai Subba Rao*, 43 Mad. 617.

(*b*) *Irrawadi Flotilla Co.* v. *Bhagwan Das*, *supra* ; *Lakhichand* v. *G. I. P Rail Co.*, 14 Bom. L. R. 165 ; 14 I. C. 793.

(*c*) *Sesham Patter* v. *S. S. Moss*, 17 Mad. 445. See *East Indian Railway Co.* v. *Kirkwood*, 48 Cal. 757 P. C. ; *Harji Khetsey* v. *B. B. & C. I. Ry. Co.*, 39 Bom. 191.

(*d*) *Per* Lord DUNEDIN in *Dominion Natural Gas Co.* v. *Collins and Perkins*, [1909] A. C. 640, 646 [P. C.] ; *Blacker* v. *Lake & Elliott Limited*, 106 L. T. 533.

(*e*) *Per* COTTON and BOWEN, L.J.J., in *Heaven* v. *Pender*, 11 Q. B. D. 503, 517 [C. A.] ; *Bates* v. *Batey & Co., Ltd.*, [1913] 3 K. B. 351.

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(3) If damage is done by reason of the neglect of such precautions or warning, it is no excuse that the damage would not have happened but for the intermeddling of some third person, if such intermeddling is such as might naturally occur (*a*).

(4) But if the immediate cause of the damage is the conscious act of volition of some third person that is a defence, for no precaution can avail against such conscious act of volition (*a*).

Comment.

The first rule is applicable to all things dangerous in themselves, such as those above described. The nature of the precautions to be taken must necessarily depend on the circumstances. In some cases it would be proper and sufficient to give warning of the danger so as to put persons on their guard against dangers which are not apparent from the nature of the thing. The following illustrations will show the nature of the precautions which the courts have held requisite in different circumstances (see also the closely allied rules stated in Arts 89—91). In most of these cases the immediate cause of the damage has been the intermedding of a third person. This is no defence if such intermedding is what would be naturally expected of a person who was unconscious of the danger or of the proper way to avoid it. "A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it;" yet in each of these circumstances the liability has been enforced. It is however another matter if a third person finding a loaded gun consciously fires it off at someone, or if a person who has bought poison consciously takes it himself or administers it to someone else. In such cases the damage is not caused by the absence of precautions, but by the wrongful act of the person who fires the gun or administers the poison.

Illustrations.

(1) Where the defendant entrusted a loaded gun to an inexperienced servant girl, and she pointed and fired it at the plaintiff's son, wounding and injuring him, it was held that the defendant was liable. He had given directions

(*a*) *Dominion Natural Gas Co.* v. *Collins and Perkins, supra.*

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that the priming should be removed so as to make the gun safe, but this was not done properly and the gun was left in a dangerous state ; so the defendant was responsible (*a*).

(2) Where the defendant negligently compounded a hair wash of dangerous chemical ingredients, and a person using it, and for whose benefit it was bought, suffered injury, the defendant was held liable (*b*). But this decision has not been followed in two recent cases where the manufacturers of articles which have caused damage to purchasers by virtue of defective manufacture have not been held liable for such damage, on the ground that as there was no contract between the parties no duty was owed by the makers to the injured purchasers (*c*).

(4) Quite apart from any warranty or the terms of the contract of sale, the vendor of goods which have some dangerous quality of which he knows, but of which the purchaser cannot be expected to be aware, owes a duty to the purchaser to take reasonable precautions by warning him that special care will be requisite, and for damages resulting from breach of that duty an action lies. Thus, where the defendants sold a tin of chlorinated lime, **knowing that it was likely to cause danger** to a person opening it unless special care was taken, and the danger was not such as would be known by the purchaser, the defendants were held liable for damage caused to the plaintiff by opening the tin without taking proper precautions, in consequence of which there was an explosion and her eyes were injured (*d*). And there is a similar duty on the part of one gratuitously lending goods to another, for breach of which, followed by damages, an action will lie. Note, that in these cases it is essential to show knowledge of the defect on the part of the seller or lender (*e*). A person who does not make but merely sells a thing he does not know to be dangerous may be liable

(*a*) *Dixon* v. *Bell*, 5 M. & S. 198.

(*b*) *George* v. *Skivington*, L R. 5 Ex. 1.

(*c*) *Blacker* v. *Lake & Elliott*, 106 L. T. 533; *Bates* v. *Batey & Co., Ld.*, [1913] 3 K. B. 351; *per contra*, *White* v. *Steadman*, [1913] 3 K. B. 340, but here LUSH, J., appears to draw a distinction between things inherently dangerous and those which are dangerous by defective manufacture only.

(*d*) *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155 [C. A.].

(*e*) *Bates* v. *Batey & Co., Limited*, [1913] 3 K. B. 351.

for breach of warranty to the buyer, but is not liable in tort to the buyer or to users of the thing (*a*).

(5) A railway company kept a turntable unlocked and therefore dangerous to children) on their land close to a public road. The railway servants knew that children were in the habit of trespassing and playing with the turntable, and took no steps to prevent them from so doing or to lock the machine so as to prevent it being dangerous. A child between four and five years of age, playing with other children on the turntable, was seriously injured. The company was held liable as they should have taken precautions to prevent such an accident as was likely to happen, and did happen, to the child (*b*), because the presence of the dangerous unlocked turntable constituted an allurement which made the children invitees. In a later case (*c*) on analogous facts, where the injury to a child arose from playing with a heap of stones on defendant's ground, the heap of stones was held not to be allurement nor to be a dangerous thing laying upon the defendants any other duties than those owed to mere licensees. In a more recent case warnings given repeatedly to children to go away from the company's premises to prevent them from being injured by playing about a working staircase was held to constitute them trespassers and so without remedy for injuries resultant in disobedience to the warnings (*d*). So if a person leaves a cart unattended in the street and boys play with it, as is their nature, and one is injured, he may have a cause of action against the owner of the cart, although the action would not have happened but for the intermeddling of himself and his companions (*e*). But it is now clear that the owner of a vehicle left on the highway will not be liable for damage done by its being set in motion by third parties unless it was reasonable that he should have anticipated the effective interference which caused the damage (*f*).

(*a*) *Longmeid* v. *Holliday*, 6 Ex. 761; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145 [C. A.].

(*b*) *Cooke* v. *Midland Great Western Rail. Co. of Ireland*, [1909] A. C. 229.

(*c*) *Latham* v. *Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398.

(*d*) *Hardy* v. *Central London Rail. Co*, 36 T. L. R. 843.

(*e*) *Lynch* v *Nurdin*, 1 Q. B. 29.

(*f*) *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148; Cf. with *Turner* v. *Coates*, 33 T. L. R. 79.

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(6) A person who consigns to a common carrier is under an absolute duty not to consign to him for carriage goods which are dangerous to carry, without warning the carrier of their dangerous character, unless the carrier knows, or ought to know, the dangerous character of the goods; and if by reason of their dangerous character the carrier or his servants are injured the consignor is liable, although he does not himself know of the dangerous character of the goods (*a*).

ART. 84.—*Contributory Negligence.*

(1) Though negligence, whereby actual damage is caused, is actionable, yet if the damage would not have happened had the plaintiff himself used ordinary care, the plaintiff cannot recover from the defendant.

(2) But where the plaintiff's own negligence is only remotely connected with the accident, and the defendant might by the exercise of ordinary care have avoided the accident, the plaintiff will be entitled to recover.

The rule of contributory negligence is well illustrated by the leading case of *Radley* v. *London and North Western Rail. Co.* (*b*). In that case the facts were these: The defendants were in the habit of taking full trucks from the siding of a colliery company and returning empty ones. Over this siding was a bridge belonging to the colliery company. One Saturday afternoon the company ran some trucks on the siding. One was loaded so high that it would not pass under the bridge. On the Sunday evening the company brought some more trucks and pushed forward those already on the siding. Finding something was holding the trucks, the engine driver put on more power and pushed till he got them on. It was the bridge which held the loaded truck, and the result was that the bridge was knocked down. Now, assuming that

(*a*) *Bamfield* v. *Goole and Sheffield Transport Co.*, [1910] 2 K. B. 94 [C. A.]; *Lyell* v. *Ganga Dai*, 1 All. 60 F. B.

(*b*) 1 App. Cas. 754. See especially, *per* Lord PENZANCE, at p. 759.

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the colliery company were negligent in loading the truck so that it would not pass under the bridge, it does not follow that their negligence was an effective cause of the accident. It may be that if the engine driver had been prudent and reasonable he should have got out to see what was wrong, and so would have avoided the consequences of the colliery company's negligence. In this view of the facts it was held that the judge who tried the case was wrong in telling the jury that the plaintiffs (the colliery owners) must satisfy them that the accident happened *solely* through the negligence of the defendants' servants, and that if both sides were negligent so as to contribute to the accident, the plaintiffs could not recover. He ought to have told them that if they thought **the engine driver might by ordinary care have avoided all accident** any previous negligence of the defendants would not preclude them from recovering.

Statement of the rule by WILLES, J.

The law on this point was thus summarised by WILLES, J.: "If both parties were equally to blame, and the accident *the result* of their joint negligence, the plaintiff would not be entitled to recover. If the negligence and default of the plaintiff was in any degree the *proximate cause* of the damage, he could not recover, however great may have been the negligence of the defendant. But that if the negligence of the plaintiff was only remotely connected with the accident, then the question was, whether the defendant might not, by the exercise of ordinary care, have avoided it" (*a*). The doctrine of *Tuff* v. *Warman* has received a refinement of application in a recent case (*b*) where, despite the negligence of the plaintiff in crossing a level-crossing when a train was approaching, and that the last opportunity to avoid the accident lay with the plaintiff, yet as the inability of the train-driver to pull up in the space left was due to the faulty condition of his brake, it was held the company could not set up the contributory negligence of the plaintiff, as the last opportunity of avoiding the accident would have lain with their driver if his brake had been in good order, and so it was held to have lain constructively with them.

So where in an action for damages for negligence, the defendants pleaded that the death was caused by the

(*a*) *Tuff* v. *Warman*, 2 C. B (N. S.) 740, 743; affirmed in Ex. Ch. 5 C. B. (N.S) 573; *H. & C. Grayson Ld.* v. *Ellerman Line Ld.*, [1920] A. C. 465; *Madhava Rao* v. *Farnandes*, 17 Mad. 368.

(*b*) *British Columbia Electric Rail. Co.* v. *Loach*, [1916] A. A. C. 719.

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plaintiffs' imprudent conduct in removing the injured person from the hospital, the court held that the removal from hospital, being subsequent to the negligence which caused the injuries, did not constitute contributory negligence (*a*).

Illustrations

Davies v. *Mann.*

(1) Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defandant drove over it, and killed it, he was held to be liable for he was bound to drive carefully, and circumspectly, and **had he done so he might readily have avoided driving over the ass** (*b*).

(2) Similarly, in a case where, in a moment of emergency, the *serang* of the ship placed in a position of extreme danger by the gross negligence of another ship (in carrying no lights), gave an order to starboard instead of to port the helm (which resulted in a collision), the former ship was held not guilty of such negligence as would make her responsible for the collision (*c*).

Butterfield v. *Forrester.*

(3 But where the defendant negligently and wrongfully left a pole across a highway, and the plaintiff, by riding negligently, ran against it and was hurt, it was held that as, if he had used ordinary care, he might have seen the pole and avoided it, the accident was entirely due to his own negligence, and the defendant was not liable (*d*).

(4) So in a case where the plaintiff attempted to jump on the footboard of a moving tramcar, but slipped and fell and was consequently injured (*e*), the court said: "If a passenger chooses to attempt to enter or leave a moving car he does so at his risk. It is not what a prudent or reasonable man should or would do, and if he does it and sustains injury while in the act of doing so, it would be an accident or a misfortune for which the company could in no event be held liable."

(*a*) *Secretary of State* v *Muhammad*, 85 P. R. 1894.

(*b*) *Davies* v. *Mann*, 10 M & W. 546.

(*c*) *India General Steam Navigation Co* v. *Jagat Chandra Kundu*, 31 Cal. 36; *Owners of The Tasmania* v. *Smith*, 15 App. Cas. 223.

(*d*) *Butterfield* v. *Forrester*, 11 East, 60.

(*e*) *Temulji Jamsetji Joshi* v. *Bombay Electric Supply and Tramway Co, Limited*, 35 Bom 478.

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Joint negligence of plaintiff and defendant.

(5) But in all cases where two persons are negligent and the accident is the result of their joint negligence, neither can recover against the other. And so, in cases of collision between carriages, the question is, whether the sole effective cause of the disaster was the negligence of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, the disaster would not have happened. In the former case he recovers, in the latter not.

(6) The plaintiff was travelling, with his arm stretched outside the carriage, by an up train. A down train passed by at high speed, and a door of one of its compartments, which was open and swinging, caught the projected limb of the plaintiff and inflicted serious injuries. In an action for damages against the railway company the court thought that there was evidence of negligence on the part of the railway company, but the plaintiff was stretching his arm outside the compartment at his own risk, and, being guilty of contributory negligence, had no right of action (*a*).

Doctrine of identification

(7) For many years it was thought that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in cases where the carrier was guilty of contributory negligence (*b*). However, this doctrine was overruled by the House of Lords, in the case of *The Bernina* (*c*), and there is no longer any rule of law that the driver of an omnibus, or coach, or cab, or the engineer of a train, or the master of a vessel, and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence (*d*).

Contributory negligence in infants.

(8) It was decided many years ago that where the plaintiff is a child of tender years, it is not necessarily a good defence to an action of negligence to prove that he himself contributed to his injury. In that case the defendant left a cart unattended in the street. The plaintiff, a boy of seven, climbed into the cart to play, another boy led on the horse, and the plaintiff fell and was hurt. If he had been

(*a*) *Dullabhji S. Sanghani* v. *G. I. P. Rail. Co.*, 34 Bom. 427 ; *Jehangir* v. *B. B. & C. I. Rail. Co.*, 37 Bom. 575.

(*b*) *Thorogood* v. *Bryan*, 8 C. B. 115.

(*c*) 13 App. Cas 1. See *The Drumlanrig*, [1911] A. C. 16.

(*d*) *Mathews* v. *London Street Tramways Co.*, 58 L. J. Q. B. 12.

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a grown-up man it would have been a good defence that the proximate cause of the accident was his own wrongdoing—but the court held that as much care cannot be expected of a boy as of a grown-up person—and the act of the plaintiff, considering his age, was not such as to disentitle him from recovering (*a*). This case and the later authorities show that what would amount to contributory negligence in a grown-up person may not be so in a child of tender years (*b*).

Persons in charge of infants.

(9) It has been held that where an infant is incapable of taking care of himself, he cannot recover if the person in whose charge he was, was guilty of contributory negligence (*c*). But whether this is consistent with principle seems questionable. For the person in charge is not the agent of the child, but of its parent or guardian : and in other respects the case of *The Bernina* (*d*) would seem to apply.

(10) The plaintiff's unmarried daughter fell into a manhole opened by the defendants for inserting a flushing door in a sewer, and died. The child's mother who was seated about four yards from the manhole admitted that before the accident occurred she knew the fence was down and the hole open. The court said that, although the mother might have been guilty of negligence which contributed to the accident, yet, if the defendants could by the exercise of ordinary care and diligence have avoided the mischief, her negligence could not excuse them (*e*).

ART. 85.—*Effective Cause.*

The negligence of the defendant must be an effective cause of the damage.

General principle.

As we have seen (*f*) wherever damage is a part of the cause of action, it must be shown that the damage com-

(*a*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*b*) *Per* KELLY, C. B., *Lay* v. *Midland Rail. Co.*, 34 L. T. 30. See also *Harrold* v. *Watney*, [1898] 2 Q. B. 320 [C. A.] ; *Jewson* v. *Gatti*, 2 T. L. R. 441 [C. A.] ; and *Cooke* v. *Midland Great Western Rail Co.*, [1909] A. C. 229.

(*c*) *Waite* v. *North Eastern Rail, Co.* El. B. & E. 719 [Ex. Ch.] ; *Taylor* v. *Dumbarton*, [1918] S. C. 96 [H. L].

(*d*) *Supra*, p. 215.

(*e*) *Narayen Jetha* v. *Municipal Commissioners and the Municipal Corporation of Bombay*, 16 Bom. 251.

(*f*) *Supra*, Art, 5.

plained of was the natural and probable result of the wrongful act. Illustrations will be found in Art. 5, many of which are cases of negligence.

Combined negligence of defendant and third party.

It sometimes happens that though the defendant was negligent, the real effective cause of the damage was either the negligence of the plaintiff or the negligence of a third person. The former is dealt with as one aspect of contributory negligence. It is well illustrated by *Butterfield* v. *Forrester* (*a*). When the immediate cause of the damage is the interference of *a third party*, it does not necessarily follow that the defendant is not liable. If the defendant's negligence is *an effective cause* of the damage, he is liable, although the damage would not have occurred but for the interference of a stranger (*b*). It is, in every case, a question of fact whether the negligence of the defendant was an effective cause of the damage or merely a remote cause (*c*).

Illustrations.

So where the defendant had taken the plaintiff's horse under an agreement for agistment and put it into a field separated by a wire fence from a cricket field, and by the negligence of the defendant's servants a gate was left open and the horse escaped into the cricket field, it was held to be the natural consequence that the cricketers should proceed to drive the horse back into the defendant's field. Whilst being so driven back the horse hurt itself against the wire fence, and the defendant was held liable, as the negligence of his servants in leaving the gate open was an effective cause of the accident (*d*).

Similarly where goods consigned to a Railway Company were in the course of transmission destroyed by a severe cyclone, the company was absolved from liability, because the cyclone was the primary cause of the injurious agency and even if the negligence of the company co-operated with it, the company was not liable (*e*).

(*a*) *Supra*, p. 214.

(*b*) *Engelhart* v. *Farrant*, [1897] 1 Q. B. 243. See *Vishnu Digambar* v. *B. B. & C. I. Ry.*, 25 Bom. L R. 881 (where the injury was caused by a fellow-passenger removing a ladder attached to a berth).

(*c*) *McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331 [C. A.]; and see *Rickards* v. *Lothian*, [1913] A. C. 263; *Ruoff* v. *Long*, [1916], 1 K. B. 148.

(*d*) *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

(*e*) *Surendra Lall* v. *Secretary of State*, 25 C. L. J. 37; 38 I. C. 702.

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ART. 86.—*Onus of Proof.*

(1) The onus of proving negligence is on the plaintiff; and that of proving contributory negligence on the defendant (*a*).

(2) But where a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things and using proper care, the accident itself affords primâ facie evidence of negligence (*b*).

Runaway horse.

(1) Thus, where a horse of the defendant suddenly bolted without any explainable cause, and, swerving on to the footpath, collided with and injured the plaintiff, it was held that the plaintiff had not produced any evidence of negligence sufficient to entitle him to recover. For it is no negligence to drive a horse along a public street, and horses will occasionally run away without any negligence of the driver (*c*).

Skidding omnibus.

(2) So, also, the mere fact of a motor omnibus skidding on a greasy road is no evidence of negligence, for it is well known that roads are often greasy and that motor omnibuses, however well constructed and designed, have a tendency to skid on slippery roads (*d*).

Accident capable of two explanations.

(3) So, where the dead body of a man was found on the defendants' railway near to a level crossing, the man having been killed by a train which bore the usual head-lights but did not whistle, it was held, in an action by the widow, that there was no evidence of negligence on the defendants' part.

(*a*) *Dublin, Wicklow, etc. Rail. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1169; *B. E. Cates* v. *Mongini Bros.*, 19 Bom L. R. 778; 42 I. C. 82; *Dekhari Tea Co. v. Assam Bengal Ry. Co.*, 47 Cal. 6.

(*b*) *Ibid.*; *Scott* v. *London Dock Co.*, 3 H. & C. 596; *Byrne* v. *Boadle*, 2 H. & C. 722; *Choutmull* v. *Rivers Steam Navigation Co.*, 24 Cal. 786; 1 C. W. N. 200; (on appeal, 26 Cal. 398 [P. C.]); *Tan Taik* v. *Irrawady Co.*, 7 Bur. L. R. 236; *Madras Rail. Co.* v. *Ratilal Kalidas*, 4 M. L. T. 251.

(*c*) *Manzoni* v. *Douglas*, 6 Q. B. D. 145.

(*d*) *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652 [C. A.].

For, as Lord HALSBURY said, "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" (*a*).

Accident prima facie due to negligence.

(4) On the other hand, where a person was walking in a public street and a barrel of flour fell upon him from a window of the defendant's house, it was held sufficient primâ facie evidence of negligence to cast on the defendant the onus of proving that the accident was not attributable to his want of care. For barrels do not usually fall out of windows in the absence of want of care (*b*). And when a railway train was thrown off the line whereby the plaintiff (a passenger) was injured, and it appeared that the engine, the coaches and the line all belonged to the same company, it was held that there was a primâ facie case of negligence, as trains do not run off the line unless there is something wrong with the line, or the train, or the running of the train (*c*). In short, the question must always depend on the nature of the accident. In general, where an accident may be equally susceptible of two explanations, one involving negligence, and the other not, the plaintiff must give some evidence of want of care. But where the probability is that the accident could only have had a negligent origin, the presumption will be reversed.

Res ipsa loquitur.

Act III. of 1865, s. 9.

(5) The onus of proving negligence on the part of carriers in respect of goods entrusted to them is not on the consignor, notwithstanding conditions in the receipt note to the contrary (*d*). An obligation to take a high degree of care attaches to carriers, and it casts on them the duty of exer-

(*a*) *Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41. See also *Davey* v. *London and South Western Rail. Co.*, 12 Q. B. D. 70 [C. A.].

(*b*) *Byrne* v. *Boadle*, 33 L. J. Ex. 13; *Scott* v. *London Dock Co.*, 3 H. & C. 596.

(*c*) *Carpue* v. *London and Brighton Co*, 5 Q. B. 747.

(*d*) *Ishwar Chand Gulab Chand* v. *G. I. P. Rail. Co.*, 3 Bom. 120; *Shelliff* v. *Scott*, 22 W. R. 39; *Kalidas Mukerjee* v. *E. I. Rail. Co*, 2 C. W. N. 609; *India General Steam Navigation Co. Ld.* v. *Gopal Chandra Guin*, 41 Cal. 80; *Akhil Chandra* v. *India General Navigation Ry. Co.*, 21 C. L. J. 56; 29 I. C. 260; *India General Steam Navigation Co. Ld.* v. *Bhagwan Chandra Pal*, 40 Cal 716. See also *India General Navigation Ry. Co. Ld.* v. *Eastern Assam Co. Ld.*, 47 Cal. 1027.

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cising all vigilance to see whatever is required for the safe conveyance of their passengers is in a fit and proper order. The burden of proving exercise of due care and skill lies on the defendants (*a*). But the Privy Council said, in a claim for damages for the loss of a son by an explosion in a railway carriage, the burden of proving that the accident was due to a want of reasonable care and diligence on the part of the railway company was on the plaintiff. Railway companies in India are not common carriers of passengers, and it is not for them to prove beyond doubt that they are not responsible for the accident (*b*).

ART. 87.—*Duties of Judge and Jury.*

Whether there is any evidence to be left to the jury from which negligence causing the injury complained of may be reasonably inferred is a question for the judge.

It is for the jury to say whether, and how far, the evidence is to be believed, and whether, in fact, there was negligence which was the effective cause of the damage (*c*).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is any evidence from which negligence **may be reasonably** inferred, and then leave it to the jury to find whether upon that evidence negligence **ought** to be inferred (*d*).

(*a*) *Todal Singh* v. *Thompson*, 2 N. W. P. 237; *River Steam Navigation Co.* v. *Choutmall*, 24 Cal. 786; on appeal, 26 Cal. 398 [P. C.].

(*b*) *East Indian Rail. Co.* v. *Kalidas Mukerjee*, 28 Cal. 401 [P. C.].

(*c*) *Metropolitan Rail. Co.* v. *Jackson*, 3 App. Cas. 193.

(*d*) *Ibid.* at p. 197.

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ART. 88.—*Volenti non fit Injuria.*

(1) In an action of negligence it is a good defence that the plaintiff, with full knowledge and appreciation of the risk of danger from the defendant's negligence, voluntarily accepted the risk and exposed himself to the danger (*a*).

(2) It is a question of fact, not of law, whether the plaintiff voluntarily incurred the risk, and the burden of proof is on the defendant (*b*).

(3) But the doctrine of acceptance of the risk cannot be set up in answer to an action for damages for negligence based on non-fulfilment of a statutory duty (*c*).

This rule must be applied with caution. It does not mean that whenever a person knows there is a risk of being injured by another's negligence whilst doing something, he is incapable of recovering in an action if, nevertheless, he does the thing with knowledge of that risk. If it were so, no one could ever bring an action for damages resulting from an accident to a train in which he was travelling, or even for being run over in the street. For everyone who travels by train or walks in the streets knows he runs a certain amount of risk in so doing. But if a person knowing of a particular risk **voluntarily accepts that risk and takes the risk upon himself,** the rule applies. For instance, if a man seeing express train coming along a line approaching a level crossing, chooses to cross the line in front of it, taking the chance of getting across in time, the rule would apply.

Situations of alternative danger.

Again, the rule does not apply where one person is put by another in a situation of alternative danger, that is to say, one in which he will be in danger if he sits still and in danger if he tries to escape. In such a case any injury he may sustain in taking the course which he thinks best in the circumstances, will be regarded as the consequence

(*a*) *Smith* v. *Baker & Sons*, [1891] A. C. 325.

(*b*) *Williams* v. *Birmingham Battery Co*, [1899] 2 Q. B. 338 [C. A.].

(*c*) *Baddely* v. *Earl Granville*, 19 Q. B. D. 423; cf. *Davies* v. *Owen*, [1919] 2 Q. B. 39.

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of his being wrongfully put in that situation and not of his own voluntary act (*a*).

So, in an action against a coach proprietor for so negligently driving his coach that the plaintiff, a passenger, was obliged to jump off the coach, whereby he broke his leg, Lord ELLENBOROUGH said: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach. It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported" (*b*).

Doctrine applied.

When a workman in the employment of a contractor engaged by the defendants had to work in a tunnel rendered dangerous by the passing of trains, and after working there a fortnight was injured by a passing train, it was held that the workman, **having continued in his employment with full knowledge,** could not make the railway company liable for an injury arising from the **danger to which he had voluntarily exposed himself,** although the railway company were guilty of negligence (*c*).

Yarmouth v. *France.*

The application of the rule has arisen chiefly in questions between employers and workmen, and in a case of this kind (under the Employers' Liability Act), Lord ESHER, M. R., stated the rule in the following words: "It seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria.* If so, that is a question of fact" (*d*). And LINDLEY, L. J., added: "A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he

(*a*) *Per* MONTAGU SMITH, J., in *Adams* v. *Lancashire and Yorkshire Rail. Co*, L. R. 4 C. P. 739, 742; *The George and Richard*, L. R. 3 A. & E. 466.

(*b*) *Jones* v. *Boyce*, 1 Stark. 493.

(*c*) *Woodley* v. *Metropolitan District Rail. Co.*, 2 Ex. D. 384. See also *Smerkinich* v. *Newport Corporation*, 76 J. P. 454.

(*d*) *Yarmouth* v. *France*, 19 Q. B. D. 647, and see *Williams* v. *Birmingham Battery Co*, [1899] 2 Q. B. 338.

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does not refuse to face it. . . . If nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on, went on as before, in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred" (*a*).

Smith v. *Baker.*

So, too, when a workman, engaged in an employment not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has voluntarily accepted the risk (*b*). Likewise, where in the course of breaking up cast iron by dropping heavy weights, pieces of iron flew around and hurt and killed a servant of the same employer working at a distance, it was held that the doctrine did not apply and that the employer was guilty of negligence in not properly fencing the space where the cast iron was broken up (*c*).

(*a*) *Yarmouth* v. *France*, 19 Q. B. D. 647.

(*b*) *Smith* v. *Baker & Sons*, [1891] A. C. 325.

(*c*) *South Indian Industrials* v. *Alamelu Ammal*, 17 L. W. 495.

CHAPTER VIII.

LIABILITY FOR BREACH OF DUTY TO PREVENT DAMAGE FROM DANGEROUS THINGS AND ANIMALS.

ART. 89.—*The Rule in Fletcher* v. *Rylands* (*a*).

(1) The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

(2) He can excuse himself by showing—

(*a*) That the escape was owing to the plaintiff's default.

(*b*) That the escape was the consequence of the act of God, or *vis major*.

(3) That the escape was due to the wrongful act of a stranger over whom the defendant had no control.

(4) The rule does not apply—

(*a*) Where the person charged has not himself brought, collected or kept the thing on his land.

(*a*) L. R. 1 Ex. 265 [Ex. Ch.]; affirmed in the House of Lords *sub nom. Rylands* v. *Fletcher*, L. R. 3 H. L. 330. The first paragraph of the Rule here given is quoted from the judgment of the Exchequer Chamber delivered by BLACKBURN, J. The other paragraphs are taken partly from that judgment and partly from later cases referred to in the explanatory note and illustration. The application of this principle of liability to those who cause damage by the explosion of materials used in manufacturing processes is exemplified in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] W. N. 281.

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(*b*) Where he has brought or collected and kept it not solely for his own purposes but wholly or in part for the benefit of the person who is damaged by its escape.

(*c*) If he has statutory authority for bringing, collecting or keeping it on his land.

(5) The defendant is only liable for the natural consequences of the escape.

Explanation.

The famous case of *Fletcher* v. *Rylands* (*a*) is the leading authority on this rule—in fact, perhaps the first case in which the rule was laid down with precision, though it had been applied in many earlier cases. In a very early case the rule was succinctly stated by saying that it is the duty of a man to keep his own filth in his own ground (*b*). In *Fletcher* v. *Rylands* the dangerous thing was a large body of water. The rule has also been applied to such things as electricity (*c*), yew trees (*d*), wire fencing (*e*), and sewage (*f*), colliery refuse (*g*) and (with some modifications) is the foundation of the liability for damage done by animals and fire (*h*).

Principle of rule.

The principle of the rule is that a person who brings on his land for his own purposes a thing of the kind mentioned in the rule, must keep it at his peril, and is *primâ facie* answerable for all the damage which is the natural consequence of its escape.

(*a*) L. R. 1 Ex. 265 ; L. R. 3 H. L. 350.

(*b*) *Tenant* v. *Goldwin*, 1 Salk, 360 ; 2 Lord Raym. 1089.

(*c*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186 ; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381 [P. C.] ; *Charing Cross Electric Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 712.

(*d*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5.

(*e*) *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254.

(*f*) *Tenant* v. *Goldwin*, 2 Lord Raym. 1089 ; *Ballard* v. *Tomlinson*, 39 Ch. D. 115 [C. A.] ; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648 [C. A.].

(*g*) *Kennard* v. *Cory Bros. & Co.* [1921] 1 A. C. 521.

(*h*) See Arts. 90, 91.

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In consequence of pile driving needed for the construction of a very high building in the neighbourhood the vibration produced such an effect on the plaintiff's house that the local authority obtained an order for the demolition of all the storey above the ground-floor. In an action for damages by subsidence, vibration and loss of support, it was held that although the plaintiff's house was an old one it was not in such a delicate state as to be easily damaged by justifiable act and on the principle of *Rylands* v. *Fletcher* the plaintiff was entitled to damages (*a*).

Excuses.

BLACKBURN, J. says; "He can excuse himself by showing that the escape was owing to the plaintiff's default (*b*) or *perhaps* that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here it would be unnecessary to inquire what excuse would be sufficient (*c*)."

Illustrations.

Rylands v. *Fletcher.*

(1) The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and **employed competent persons** to construct it, so that there was *no negligence*. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. The gist of the action was the collecting of the water and *not keeping it from escaping*, and to the *primâ facie* case raised by the facts the defendants offered no answer (*d*).

In 1875 the next important case (*e*) which followed this decision raised the question of what would amount to an answer to the *primâ facie* case set up in *Rylands* v. *Fletcher*; and it was decided that in the absence of

(*a*) *Heare & Co. Ltd.* v. *Mc Alphine & Sons*, [1922] W.N. 329.

(*b*) See Art. 11, *ante*.

(*c*) *Rylands* v. *Fletcher*, L. R. 3 H. L. at p. 340.

(*d*) *Ibid.*

(*e*) *Nichols* v. *Marsland*, 2 Ex. D. 1 [C. A.]; *Greenock Corporation* v. *Caledonian Rail. Co.*, [1917] A. C., distinguished at bottom of p. 573.

negligence on the part of the defendant, act of God or *vis major* causing the escape of the dangerous thing amounts to an excuse, and such defendant is consequently not liable for the resultant damage.

Act of God.

(2) On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream, which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools by successive weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment was carried away by the pressure, and the water in the pools, being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the pools, and that the flood was so great that it **could not reasonably have been anticipated.** The court found that this was in substance a finding that the escape of the water was caused by the *act of God* or *vis major*, and that accordingly the defendant was not liable (*a*).

(3) But where the damage was caused by the negligence of the defendants in the construction of bridges and embankments in a creek for carrying a duct line, the fact that *vis major* co-existed, could not discharge their liability. Before the excuse could be validly pleaded they have done all that they ought to do (*b*).

This was followed in 1879 (*c*) by a decision that where a third party over whom the defendant has no control brings a dangerous article on to the defendant's land and thereby causes this new danger and the defendant's article to escape, in the absence of negligence on the part of the defendant he is not liable for the damage resulting from the third party's action.

(*a*) *Nichols* v. *Marsland*, 2 Ex. D. 1 [C.A.]. See also *Ram Lal* v. *Lill Dhary*, 3 Cal. 776; *Goroo Charan* v. *Ram Dutt*, 2 W. R. 43; *Municipality of Hubli* v. *Ralli Brothers*, 35 Bom. 49?; *Jacob Elias Sassoon* v. *Dossa Kalian*, 5 S. L. R. 192; 15 I. C. 757; *Lallu* v. *Fazl Haq*, 1 U. P. L. R. 15.

(*b*) *Municipal Corporation of Bombay* v. *Vasudeo Ramachandra*, 6 Bom. L. R. 899; *Murlidhar* v. *Bhangi*, 50 I. C. 615.

(*c*) *Box* v *Jubb*, 4 Ex. D. 76.

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Third party bringing thing on to defendant's land.

(4) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; for the overflow was not caused by anything which he had done, nor had he any reasonable means of preventing it. As POLLOCK, B., said: "Here this *water has not been accumulated by the defendants*, but has come from elsewhere and added to that which was properly and safely there. For this the defendants . . . cannot be held liable" (*a*).

In 1913 the Judicial Committee of the Privy Council decided that where the escape of the dangerous article is caused by the malicious act of a third person over whom the defendant had no control, and without negligence on the part of the defendant, the latter is not liable for damage which results from such escape (*a*).

(5) Where the defendant was lessee of a building and plaintiff his tenant of part of the second floor, the plaintiff's premises were damaged through the flow of water from the lavatory on the fourth floor due to the turning on of the water-taps and plugging up of the waste-pipes by the malicious act of a third person over whom the defendant had no control, it was held that as no negligence on the part of the defendant was shown and as it was not reasonable that the defendant should have anticipated the interference of the third party which actually caused the escape of the water, the defendant could not be said to have caused its escape and in consequence was not liable (*b*). A distinction was drawn in this case between the natural and non-natural user of property (*c*).

Escape of water falling on land

(6) It has been held that this rule does not apply where the water which escapes has accumulated on the defendant's land by *natural causes*, and the defendant has done nothing to cause it to accumulate (*d*), and has taken no active means

(*a*) *Box* v. *Jubb*, 4 Ex. D. 76.

(*b*) *Rickards* v. *Lothian*, [1913] A. C. 263.

(*c*) *Ibid* at p. 280; and compare the reasoning in this case with that in *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148.

(*d*) *Wilson* v. *Waddell*, 2 App. Cas. 96; and see *Fletcher* v. *Smith*, 2 App. Cas. 781; *Greenock Corporation* v. *Caledonian Railway Co.*, [1916] A. C. 556.

to cause it to escape on to his neighbour's land (*a*). If an extraordinary flood is seen to be coming the owner may protect his land from it and so turn it away without being responsible for the consequences (*b*). Similarly in the case of visitations of locusts, any person apprehending damage from them may drive them away, just as he is entitled to scare crows without regard to the direction they may take in leaving (*c*).

(7) So where a man dug a trench on his own land for the purpose of constructing a building on it, and the rainfall collected in the trench and caused damage to the neighbour's walls by percolation, the former was not liable, for it was an act done in the natural and usual course of enjoyment of the defendant's property (*d*). But the retention of water on one part of a man's land in order that it might not flow on to another part is not an act done in the natural and usual course of the enjoyment of property, which would protect the man who does it from being liable in damages if he injures his neighbour's land (*e*).

(8) The defendant was owner of a house which he let out in floors to separate tenants. The different floors were supplied with water from a cistern at the top of the house. One of the supply pipes burst and the plaintiff's tenement, in the basement, was flooded. As the defendant has stored the water for the benefit of the plaintiff (along with the other tenants) he was not liable in the absence of negligence (*f*). And the same rule applies where water is

(*a*) *Whalley* v *Lancashire and Yorkshire Rail. Co*, 13 Q. B. D. 131 [C. A.]; *Shah Yad Ali* v. *Shyam Pratab Dubey*, 2 Pat. L. W. 8; 41 I. C. 382.

(*b*) *Per* COTTON, L. J., in *Whalley* v. *Lancashire and Yorkshire Rail. Co., supra.*

(*c*) *Samuel Jacobus* v. *Daniel Wilhelms*, 15 C. W. N. 569; 10 I. C. 460 P. C.

(*d*) *Moholal* v. *Bai Jivkore*, 28 Bom. 472. See also *Baldeo Das* v. *Secretary of State*, 30 P. R. 1883; *Khenaran* v. *Shristidhar*, 16 C. W. N. 875; 15 I. C. 543.

(*e*) *Ramanuja Chariar* v. *Krishnasami Mudali*, 31 Mad. 169. See also *Musamat Anundmoyee Dossee* v. *Musamat Hameedunissa*, Marsh (1862), 85; *Becharam Chowdri* v. *Puhunath Jha*, 2 B. L R. App. 53.

(*f*) *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; [C. A.]. See also *Snow* v. *Whitehead*, 27 Ch. D. 588.

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stored partly for the plaintiff's benefit and partly for the defendant's (*a*).

(9) A reservoir belonging to the defendant had burst and the flood caused by its bursting had destroyed the permanent way in places and done other damage. The plaintiff, without averring negligence, took his stand on the maxim *sic utere tuo ut alienum non lædas*. The Privy Council held that the defendant possessed, as regards this reservoir, powers analogous to statutory powers, and stored water in pursuance of ancient custom and for the general benefit of the district, and could not be held liable unless negligence were averred and proved (*b*).

Yew trees and thistles.

(10) If a person plants on his own land yew trees and they grow so that the branches project over his neighbour's land, and his neighbour's horses and cattle eat of them and are poisoned, the person planting the yew trees is liable for this natural consequence of their escape (*c*). But he is not liable if his neighbour's cattle stray on to his land and eat them; for it is his neighbour's duty to keep his cattle from straying (*d*). Also a landlord is not liable if he lets premises adjoining his own with his yew trees overhanging the premises let at the time the letting begins, for the tenant must take the premises as he finds them (*e*). Nor is he liable if he **has not planted them** on his land and clippings escape on to his neighbour's land without his knowledge (*f*). So also a person is not liable for the escape from his land of thistle seeds, when the thistles have grown naturally on his own land (*g*).

(*a*) *Carstairs* v. *Tayler*, L. R. 6 Ex. 217; *Whitmores Edenbridge, Limited* v *Stanford*, [1909] 1 Ch. 427; *Romanji Mancherji* v. *Mahomed Ali Haji Ismail*, 7 Bom. L. R. 713.

(*b*) *Madras Rail. Co.* v *Zemindar of Carvatenagaram*, L. R. 1 I. A. 364. See also *Shah Yad Ali* v. *Shyam Pratab Dubey*, 2 Pat. L. W. 8; 41 I. C. 382.

(*c*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5, explaining *Wilson* v. *Newberry*, L. R. 7 Q B 31; *Middleton* v. *Humphries*, 47 I. L. T. 160.

(*d*) *Ponting* v *Noakes*, [1894] 2 Q. B. 281.

(*e*) *Cheater* v. *Cater*, [1918] 1 K. B. 247.

(*f*) *Wilson* v. *Newberry*, L. R. 7 Q. B. 31.

(*g*) *Giles* v. *Walker*, 24 Q. B. D. 656.

ART. 90.—*Damage by Animals.*

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(1) A person who keeps a **wild animal** or a **domestic animal known by him to be vicious** keeps it at his peril, and is liable for all the natural consequences of his not keeping it securely, such as attacks on mankind (*a*).

(2) A person who keeps a *dog* is liable for any injury it causes to cattle, sheep, horses, etc., although he does not know it has any propensity to attack them (*b*).

(3) A person who keeps a dog or other domestic animal is not liable for the consequences of its attacking mankind unless he keeps it with knowledge that it has a propensity to attack mankind (*c*).

Explanation.

Animals are of two kinds in law :

(i) **Wild animals,** *i.e.*, animals which are not ordinarily kept in captivity in this country.

This class includes elephants (*d*), bears (*e*), monkeys (*f*), and doubtless many others. These animals a man keeps at his peril, whether or not he knows that the particular specimen is dangerous.

(ii) **Domestic animals,** including dogs (*g*), horses (*h*), bulls (*i*), rams (*j*), and others.

(*a*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258 [C. A.]; *Baker* v. *Snell*, [1908] 2 K. B. 825; *White and Wife* v. *Steadman & Sons*, [1913] 3 K. B. 340; *Maung Gyi* v. *Maung Po To*, (1897—1901), 2 U. B R. 565; *Maung Saw* v. *Maung Kyaw*, (1897—1901), 2 U. B R. 567; *Maung Kyaw Dun* v. *Ma Kyin*, (1897—1901), 2 U. B. R. 570.

(*b*) Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (1).

(*c*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430; *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

(*d*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258; *Vedapuratti* v. *Koppannair*, 35 Mad. 708.

(*e*) *Besozzi* v. *Harris*, 1 F. & F 92.

(*f*) *May* v. *Burdett*, 9 Q. B. 101.

(*g*) *Baker* v. *Snell*, [1908] 2 K. B. 825.

(*h*) *Cox* v *Burbidge*, 13 C. B. (N.S.) 430. See however *Manton* v. *Brocklebank*, [1923] 1 K. B. 406.

(*i*) *Hudson* v. *Roberts*, 6 Ex. 697.

(*j*) *Jackson* v. *Smithson*, 15 M. & W. 563.

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These animals are not, in theory of law, necessarily dangerous, and an owner does not keep them at his peril, unless in the particular case he knows the animal is dangerous. If he knows the animal is dangerous he keeps it at his peril just as if it were a wild animal (*a*). The case of *Baker* v. *Snell* (*b*) is quoted as the authority for saying that the keeper of an animal known to be dangerous keeps it at his peril and is liable for damage, however caused, which results from its activities. This appears to be the decision of COZENS HARDY, M. R., and FARWELL, L.J., based apparently on the view that to keep an animal knowing it is dangerous is of itself a wrongful act. These judges in their judgments refer with approval to the words respectively of MELLISH, L. J., in *Nichols* v. *Marsland*, (*c*), BLACKBURN, J., in *Rylands* v. *Fletcher* (*d*), delivering the judgments of their respective courts, where the person who brings and keeps a dangerous thing on his land is held to be answerable for damage done by not keeping it secure, subject to the exceptions of act of God, *vis major*, or the plaintiff's own default. Yet BLACKBURN, J., says that a man is subject to an equal degree of liability for whatever he keeps that is likely to do mischief, and this dictum, contained in this judgment, is quoted with approval by KENNEDY, L.J., in his dissenting judgment in *Baker* v. *Snell* (at page 835), where he takes the view, apparently supported by CHANNELL, J., in the court below, that the liability of the keeper is made out *primâ facie only* by the damage caused by the action of the dangerous thing. If this view be correct, then the keeper of the dangerous thing is entitled to put forward a ground of exemption from liability if he can show such ground. In *Nichols* v. *Marsland*, act of God or *vis major* was held, in the absence of negligence, and where it was the sole cause of the escape of the danger, to be a ground of exemption; and based on that decision is the recent decision of *Rickards* v. *Lothian* (*e*), where in the absence of negligence the malicious act of a third party was held also to be a ground of exemption from liability for resultant damage. It is submitted that, despite the actual decision in *Baker* v. *Snell*, there are strong grounds for

(*a*) *Ganda Singh* v. *Chunni Lal*, 19 C. W. N. 916; 29 I. C. 862. But a man is not liable for what is done by a dog to his seventeen-year-old daughter who lives with him (*North* v. *Wood*, [1914] 1 K. B. 629).

(*b*) 1908 2 K. B. 825.

(*c*) L. R 10 Ex. 255.

(*d*) L. R. 1 Ex. 265.

(*e*) [1913] A C. 263.

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the view that the liability for *any* dangerous article brought and kept on defendant's land is on the same basis, and that *Rickards* v. *Lothian* now represents the true view of such liability.

If a person allows an unbroken colt run loose after a mare at night on the highway he is guilty of negligence (*a*). The owner of a buffalo would not be liable for injuries caused by it in the absence of neglect or carelessness on his part in keeping the animal (*b*). Where a buffalo known to be vicious was given to an agister to tend it, the latter and not the owner is liable for damage caused by it (*c*).

Knowledge of the savage character of an animal is usually called *scienter*. The plaintiff in suing for damages for a bite of the defendant's dog must always prove *scienter*. If he does not he will fail (*d*). In the case of dogs, it is usually proved by evidence that the dog has, to the knowledge of the defendant, on a previous occasion bitten or attempted to bite a human being (*e*), or that, subsequent to the starting of the action, the dog made similar attacks on other persons (*f*). It may be proved in other ways, as for instance, by evidence that the defendant had told people "to beware of the dog" (*g*). It must be proved that the dog was known to be "**accustomed to bite mankind.**" Accordingly it is not enough to prove a previous tendency to bite other animals—for an animal may be disposed to bite other animals and yet not savage *qua* human beings (*h*).

It has been held that, if the owner of the dog appoints a servant *to keep it*, the servant's knowledge of the animal's disposition is the knowledge of the master, for it is know-

(*a*) *Turner* v. *Coates*, [1917] 1 K. B 670.

(*b*) *Mangal Singh* v. *Lehna Singh*, 72 P. R. 1870.

(*c*) *Ma Myaing* v. *Maung Shwethe*, 9 L. B. R. 54; 42 I. C. 52.

(*d*) *Mishwe Mi* v. *Kapila Maistry*, U. B. R. (1902—1903), Tort, 1; *U. Kyaw Mya* v. *Mi Win Kanda*, 3 Bur. L. T. 140; 8 I. C. 984 ("It is essential in actions of this kind for the plaintiff to show that the damage done was caused or rendered possible by the defendant's negligence"); *Maung Ngwe Ya* v. *Maung Shwe Ye*, 8 L. B. R. 388; 12 I C. 910.

(*e*) A proof of an *attempt* to bite is enough (*Worth* v. *Gilling*, L R. 2 C. P. 1).

(*f*) *Gordon* v. *Mackenzie*, 50 Sc. L. R. 64.

(*g*) *Judge* v *Cox*, 1 Stark 285; *Hudson* v. *Roberts*, 6 Ex. 697.

(*h*) *Osborne* v. *Chocqueel*, [1896] 2 Q. B. 109.

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ledge acquired by him in relation to a matter within the scope of his employment (*a*). But if another basis for the action can be found, *e.g.*, trespass, then the need to prove *scienter* no longer exists (*b*).

Dogs Act, 1906.

At common law an action did not lie against an owner of a dog which bit or worried sheep or cattle, without proof of *scienter*. But now this is altered by statute (*c*), and the owner is liable in damages for injury done to any cattle, horses, mules, asses, sheep, goats or swine, and it is not necessary to prove the previous mischievous propensity of the dog.

Scienter must be proved even in the case of such animals as bulls and rams, though it is well known that they are often dangerous ; but no proof of *scienter* is necessary where a human being is attacked by the usually harmless elephant. He is in contemplation of law a wild animal which any person keeps at his peril (*d*).

Animals straying on to highway.

Though it is the duty of an owner of a domestic animal to keep it on his own land, and he may be liable if it escapes on to a highway for such damage as an animal of the kind would be likely to do, yet he is not liable for all the consequences of its escape. Thus, if a horse not known to be dangerous escapes, the owner will not be liable for the biting or kicking a human being (*e*).

So, too, where a fowl straying on a highway was frightened by a dog, and flew into the spokes of the wheel of a passing bicycle, and the bicyclist was thereby thrown and injured, it was held that this was **not** a natural consequence of the straying of a fowl (*f*).

Animals straying from highways.

It may be added that where a person is lawfully using a public highway for driving an animal, he is not under an absolute liability to prevent it from straying. If without

(*a*) *Baldwin* v. *Casella*, L. R. 7 Ex. 325; *Prokash Kumar Mookerjee* v. *A. D. F. Harvey*, 36 Cal. 1021.

(*b*) *Theyer* v. *Purnell*, [1918] 2 K. B. 333.

(*c*) Dog's Act, 1906 (6 Edw. 7, c. 32), ss. 1, 7, repealing and (on this point) re-enacting the Dog's Act of 1865 to the same effect.

(*d*) *Filburn* v. *People's Palace*, 25 Q. B. D. 258.

(*e*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430; *Jones* v. *Lee*, 106 L. T. 51; 28 T. L. R. 122.

(*f*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345; and compare *Higgins* v. *Searle*, 100 L. T. 280 [C. A.] (damage resulting from a sow's fright at the horn of a passing motor); also *Heath's Garage Ld.* v. *Hodges*, [1916] 2 K. B. 370.

negligence on his part it leaves the highway and does damage to an adjoining owner's land, he is not liable; for, though a man must keep his animals from trespassing from his own land on to his neighbour's, there is no obligation on persons using a highway to fence it, and the owner of land adjoining a highway must protect himself (*a*). Of course this will not justify wilful trespass, or even negligence in allowing animals to trespass from a highway.

Trespass by domestic animals.

There is a duty on a man to keep his cattle in; and if they stray on another's land he is liable in trespass for the natural and direct consequences of their so doing. So, if a horse gets out of a field through a defective fence and trespasses on another's land, the owner is liable even for damage it does by kicking another horse, that being a natural consequence of the trespass (*b*). Similarly, when owing to the defendants' negligence their cows trespassed on plaintiff's lands and destroyed the indigo plants thereon, the defendants were made liable for substantial damages (*c*). And even if a horse merely kicks another **through a fence**, the owner may be liable, as it is a trespass even to put one foot over the boundary of another's land (*d*). As between two adjoining owners of land there may however, be a duty imposed on one by grant or prescription to fence for the benefit of the other. If animals stray by reason of a neglect of this duty, such straying is not actionable (*e*).

Liability to trespassers.

In *Lowery* v. *Walker* (*f*), it was held in the Court of Appeal that an occupier of land who kept on it a horse which he knew was bad-tempered and prone to bite, was **not liable to a trespasser** who was bitten. In the House of Lords the decision was reversed on the ground that the plaintiff was not a trespasser; but the decision in the Court of Appeal seems to be sound, on the assumption that the plaintiff was a trespasser. If it were not so, no farmer could safely keep a savage bull. But towards licensees the general proposition applies, and the owner is bound to secure them from injury by an animal which he knows to be savage.

(*a*) *Tillett* v. *Ward*, 10 Q. B. D. 17. The owner of cattle straying on to land is bound to remove them within a reasonable time, *i e.*, reasonable in all the circumstances (*Goodwyn* v. *Cheveley*, 4 H. & N. 631) See *Madhu* v. *Akaji*, 8 N. L. R. 190.

(*b*) *Lee* v. *Riley*, 18 C. B. (N. S.) 722.

(*c*) *Sreeharee Roy* v. *James Hill*, 9 W. R. 156.

(*d*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10.

(*e*) See *Boyle* v. *Tamlyn* 6 B. & C. 329. See *Ellis* v. *Bangard*, 106 L. T. 51.

(*f*) [1910] 1 K. B. 173 [C. A.]; reversed, [1911] A. C. 10.

Art. 91. ART. 91.—*Duty to keep Fire from doing Mischief.*

(1) If a person **intentionally** makes a fire on his land he must see that it does no harm to others and answer the damage if it does (*a*).

(2) If a person **by his negligence** allows a fire to arise on his land he is liable if it spreads to his neighbour's land and does damage (*b*).

(3) If a fire **accidentally** arises on a person's land and it spreads without negligence on his part he is not answerable (*c*).

(4) Where a person brings fire into dangerous proximity to another's land **without statutory authority** he does so at his peril, and is liable if it does damage (*d*). If he had statutory authority he is only liable if the damage results from negligence in using his statutory powers (*e*).

Explanation. Fire is obviously a thing which, if not kept within bounds, may do great mischief, and the common law rule seems to be that a person lights any fire on his land or in his house **at his peril**; though he is not liable for damage done by a fire which begins accidentally (*i.e.*, without negligence) or is lighted by a third person.

Illustrations. Where the defendant's servant, cleaning his car in plaintiff's garage, turned the starting handle and a flame shot up from the carburettor, whereupon the servant neglected at once to turn off the petrol supply tap, with the result that the fire extended to the tanks and thence damaged plaintiff's garage, it was held that s. 86 of the Fires Preven-

(*a*) *Tubervil* v. *Stamp*, 1 Salk. 13.

(*b*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 461; *Filliter* v. *Phippard*, 11 B. C. 347.

(*c*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86, not limited to the metropolis. See *Filliter* v. *Phippard*, 11 Q. B. 347. and as to what is and what is not an accidental fire, see *Musgrove* v. *Pandelis*, [1919] 2 K. B. 43.

(*d*) *Mansel* v. *Webb*, 88 L. J. K. B. 323.

(*e*) *Jones* v. *Festiniog Rail. Co.* L. R. 3 Q. B. 733; *Powell* v. *Fall*, 5 Q. B. D. 597 [C. A.]; *Smith* v. *London and South Western Rail. Co.* L. R. 6 C. P. 14 [Ex. Ch.].

tion (Metropolis) Act, 1774, was no defence, because (I) the fire which caused the damage was not the fire in the carburettor, but the subsequent one in the petrol tanks caused by the servant's neglect to turn off the petrol supply tap; (2) that the statute left unaffected the common-law liability of the defendant as owner of a potentially dangerous thing which causes damage. Defendant was therefore liable (*a*).

Liability of railway companies.

A person who, without statutory authority, uses a steam engine on a highway or a railway, is liable for all damage done by escaping sparks setting fire to crops, etc., quite apart from negligence. He uses the fire at his peril (*b*). But railway companies which have statutory authority for using locomotives are, as we have seen, protected by their statutory authority from this absolute liability, and are, at common law, not liable for fires caused by sparks without negligence (*c*). But they are liable if they cause fires by their negligence (*d*).

But when the statutory authority is not directive but discretionary due consideration must be given to the rights of others (*e*).

Railway Fires Act, 1905.

By the Railway Fires Act, 1905 (*f*), railway companies are made responsible for damage done to agricultural land or agricultural crops by fire arising from sparks from locomotive engines, **notwithstanding that the engine is used with statutory authority**, provided the claim for damage does not exceed £100. Railway companies are by the same Act given powers of entering on land for the purpose of extinguishing or arresting fire, and of doing certain things to diminish the risk of fire.

(*a*) *Musgrove* v. *Pandelis*, [1919] 2 K. B. 43.

(*b*) *Jones* v. *Festiniog Rail. Co.*, L. R. 3 Q. B. 733; *Powell* v. *Fall*, 5 Q. B. D. 597.

(*c*) *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679 [Ex. Ch.]; *Halford* v. *E. I. Co.*, 14 B. L. R I.

(*d*) *Smith* v. *London and South Western Rail, Co.*, L. R. 6 C. P. 14 [Ex. Ch.].

(*e*) *Morrison* v. *Sheffield Corporation*, [1917] 2 K. B. 866.

(*f*) 5 Edw. 7, c. 11.

CHAPTER IX.

LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR SERVANTS AND WORKMEN.

SECTION I.—COMMON LAW LIABILITY.

We have seen (*ante*, Art. 27) that generally a master is liable for the negligence of his servants committed in the course of their employment; but the liability of a master to his servant for an injury resulting from the negligence of a fellow-servant, differs materially from his liability to a third party for a similar injury, by reason of the common law rule that a master is not so liable where the injurer and the injured are the servants of a common master in a common employment, and the injury was inflicted in the course of that employment.

Common employment.

This rule, known as the doctrine of common employment, was founded on the idea that the servant takes all the risks incident to his employment as part of the contract of service. With regard to servants generally it still exists, but with regard to certain classes of servants Parliament has of late years made large exceptions to it (1) by the Employers' Liability Act, 1880, and (2) by the Workmen's Compensation Act, 1906.

Employers' Liability Act.

The Employers' Liability Act, 1880, does not abolish the doctrine of common employment, but it gives a remedy by action for damages in certain specific cases to servants who are injured by the negligence of their fellow-servants in the course of their employment.

Workmen's Compensation Act.

The **Workmen's Compensation Act does not abolish the doctrine of common employment or repeal the Employers' Liability Act,** but it gives to all servants to whom it applies a statutory right to be compensated by their masters for accidents suffered by them in the course of and arising out of their employment, whether such accidents are caused by the negligence of a fellow-servant or not. In other words, it gives to servants to whom it applies a right to compensation quite independent of any tort whatever. Its consideration, therefore, does not fall strictly within the

scope of this work. But the importance of the subject is such that the student may reasonably expect to find some account of the Act and its main provisions. Art. 91.

ART. 92.—*The Doctrine of Common Employment.*

(1) A master is not liable to his servant for damage resulting from the negligence or unskilfulness of his fellow-servant in the course of their common employment.

(2) The doctrine only applies when there is both a common master and common employment under that master.

(3) Common employment does not necessarily imply that both servants should be engaged in the same or even similar acts, or in the same grade of employment, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which must be contemplated as incident thereto (*a*). And the defence of common employment is good against an infant (*b*).

(4) A master who is personally negligent is liable to his servant for damage resulting from such negligence; and such negligence may consist in—

(a) employing another servant knowing him to be incompetent or without making proper inquiries as to his competence (*c*);

(*a*) *Morgan* v. *Vale of Neath Rail. Co.*, L. R 1 Q. B. 149 [Ex. Ch.]; *Allen* v. *New Gas* Co., 1 Ex. D. 251.

(*b*) *Heasmer* v. *Pickfords, Limited*, 36 T. L. R, 818.

(*c*) *Tarrant* v. *Webb*, 18 C. B. 797.

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(b) retaining in his employment a servant whom he knows to be habitually negligent (*a*);

(c) allowing the premises, plant or machinery to be in a dangerous condition, when he knew or might have known they were dangerous (*b*);

(d) breach of an absolute unqualified duty imposed upon the employer by statute to do something for the protection of workmen (*c*).

Explanation of rule.

The rule was first established in *Priestley* v. *Fowler* (*d*). In that case a butcher's man was ordered to deliver meat from a van. The man was overloaded by the negligence of a fellow-servant, in consequence of which it broke down and the butcher's man was hurt. The master was held not liable.

It was further established in *Hutchinson* v. *York, Newcastle and Berwick Rail Co.* (*e*), in which it was held that where a servant of a railway company in discharge of his duty as such was proceeding in a train under the guidance of other servants of the company, through whose negligence a collision took place, and he was killed, his personal representatives had no cause of action. The foundation of the doctrine is "that, under the circumstances, the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself" (*f*).

(*a*) See *Senior* v. *Ward*, 28 L. J. Q. B. 139.

(*b*) *Williams* v. *Birmingham Battery, etc. Co.*, [1899] 2 Q B 338 [C.A.].

(*c*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C.A.]. See *Butler* v. *Fife Coal Co*, [1912] A. C. 149; *Watkins* v. *Naval Colliery Co.*, [1911] 2 K. B. 162 [C.A.].

(*d*) 3 M. & W. 1.

(*e*) 5 Ex. 343.

(*f*) *Per* COLLINS, M. R., in *Burr* v. *Theatre Royal, Drury Lane, Limited*, [1907] 1 K. B. 544 [C.A.], at p. 554.

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In India, where there is no legislation analogous to the Employers Liability Act, a servant has no cause of action against his master for the neglect of another servant in the common employment of the same master, and this notwithstanding the fact that the nature of the employment of the servant suffering the injury and the servant whose neglect causes the damage is very dissimilar (*a*).

Illustratians. Common employment.

(1) The driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit the miners working therein, and the miners themselves; all these are fellow-servants within the meaning of the doctrine (*b*); and so are the captain of a ship and the sailors employed under him (*c*); and the scene-shifter and the chorus girl engaged to sing in a pantomime (*d*).

(2) In *Morgan* v. *Vale of Neath Rail Co.* (*e*), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to the ground and injured. It was held however, that he could not recover against the company; on the ground, that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment.

(3) Where a workman was, after his day's work was done, going home in a train which the colliery company ran voluntarily for the convenience of the colliers and was killed by the negligence of a servant of the company employed in mending a bridge, it was held that the colliers and the other were in common employment, though the

(*a*) *Blanchett* v. *Secretary of State for India in Council*, 9 A. L. J. 173; 13 I. C. 417.

(*b*) *Barton's-hill Coal Co.* v. *Reid*, 4 Jur. (N.S.) 767 [H. L.].

(*c*) *Hedley* v. *Pinkney & Sons Steamship Co.*, [1892] 1 Q.B. 58 [C.A.].

(*d*) *Burr v. Theatre Royal, Drury Lane, Limited*, [1907] 1 K.B. 544.

(*e*) L. R. 1 Q. B. 149 [Ex. Ch.].

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accident happened whilst the deceased was not being actually employed, as he must be deemed to have undertaken the risk of such an accident (*a*).

Common master but not common employment.

(4) But when a collision occurred between two steamships belonging to the same owners, it was held that the crew of ship A. were not in common employment with the crew of ship B. (although employed by the same masters), so as to protect the owners from liability to the crew of ship A. for the negligence of their servants, the crew of ship B. (*b*).

Common employment but not common master.

(5) Where one of two railway companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply, for the men though in common employment are not in the employment of a common master (*c*).

(6) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor, for the servant of the contractor is not the servant of the contractor's employer; or where the person injured is a servant of one contractor, and the person by whose negligence he is injured is the servant of another contractor (*d*).

Personal negligence of master.

(7) Whilst a workman was in the course of his employment descending from an elevated tramway belonging to his employers his foot slipped and he fell to the ground and received injuries. His employers had provided no ladder or other safe means of descending from the tramway. In an action brought against the employers it was proved that it was dangerous to descend without a ladder, and that the employers knew this, and knew there was no ladder. On this it was held they were liable for personal negligence. If proper appliances had been provided and they had got out of order without the knowledge of the employers they would not have been liable (*e*).

(*a*) *Coldrick* v. *Partridge, Jones & Co.*, [1909] 1 K. B. 530 [C. A.].

(*b*) *The Petrel*, [1893] P. 320.

(*c*) *Warburton* v. *Great Western Rail. Co.*, L. R. 2 Ex. 30; *Swainson* v. *North Eastern Rail. Co.*, 3 Ex. D. 341 [C. A.]; *Blanchett* v. *Secretary of State for India in Council, supra.*

(*d*) *Johnson* v. *Lindsay*, [1891] A. C. 371.

(*e*) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338 [C. A.].

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(8) A workman was injured in consequence of a breach by his employer of the statutory duty to maintain fencing for dangerous machinery, imposed by the Factory and Workshop Act, 1878. For the breach of this absolute duty he had a right of action, and it was no defence that the defect in the fence was due to the negligence of a fellow workman (*a*).

(9) So, where the plaintiff's husband was killed by an out-break of poisonous gas in the defendants' coal mine while working in the employment of the defendants, it was held that there was a duty on the defendants as owners of the mine to appoint and keep in charge persons competent to deal with dangers arising in the mine, and as they had not discharged their duty, they were liable at common law (*b*).

ART. 93.—*Volunteer Servants—Volenti non fit Injuria.*

If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, the doctrine of common employment applies, and no action will lie *at common law* against the master.

Explanation.

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. He has taken upon himself the risk of the common employment, and he cannot impose on the master a greater liability than that in which the master stands towards his own servants.

Thus, where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and whilst so engaged, other servants of the company negli-

(*a*) *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402 [C. A.].

(*b*) *Butler* (or *Black*) v. *Fife Coal Co.*, [1912] A. C. 149. See *South Indian Industrials* v. *Alameluammal*, 17 L. W. 495.

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gently propelled a locomotive against, and so killed, the volunteer, it was held that the company was not liable (*a*).

Exception.

Where a person aids the servants of another, with such other's consent or acquiescence, and not as a mere volunteer, but for the purpose of expediting some business of his own, he is not considered to be in a position of a servant *pro tempore* (*b*).

SECTION II.—THE EMPLOYERS' LIABILITY ACT, 1880 (*c*).

ART. 94.—*Epitome of Act.*

(1) In the case of railway servants, labourers, husbandmen, journeymen, artificers, handicraftsmen, miners, and other persons engaged in **manual** labour and **not being domestic or menial servants,** an employer cannot set up the defence of common employment in any case where the injury complained of is due to any of the following causes, *viz.* :

(*a*) A defect in the condition of the ways, works, machinery, or plant which arose from, or had not been discovered, or remedied owing to the *negligence* of the employer, or of some person entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition. This includes original defectiveness or unsuitability for its task of the plant, etc,, employed.

(*a*) *Degg* v. *Midland Rail Co.*, 1 H. & M. 773 ; *Potter* v. *Faulkner*, 1 B. & S. 800 [Ex. Ch.].

(*b*) *Wright* v. *London and North Western Rail. Co.*, 1 Q. B. D. 252 [C. A.]; and see *Hayward* v. *Drury Lane Theatre, Limited*, [1917] 2 K. B. 899.

(*c*) 43 & 44 Vict. c. 42.

(*b*) The *negligence* in the exercise of superintendence of any person in the service of the employer whose sole or principal duty is superintendence, and who is not ordinarily engaged in manual labour.

(*c*) The *negligence* of a person in the employment of the master to whose orders or directions the servant at the time of the injury was bound to conform and did conform.

(*d*) An act or omission of any person in the service of the employer done or made **in obedience to the rules or byelaws of the employer** (not approved by a Government department), or **in obedience to particular instructions** given by any person delegated with the authority of the employer.

(*e*) The **negligence** of any person in the service of the employer having the charge or control of any signal points, locomotive-engine, or train upon a railway.

But the workman injured in each of the above cases cannot recover if he knew of the negligence or defect and did not complain of it to a superior within a reasonable time, unless he was aware the superior or employer already knew of such negligence or defect.

(2) The injured servant, or his representatives, must give notice of his claim to the employer within six weeks of the accident, unless, in case of death, the judge thinks there was reasonable excuse for not giving it.

(3) The action must be commenced by the injured servant within six months, or by his

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personal representatives (if he is killed) within twelve months.

(4) The action must be brought in the County Court, but is removable, under very exceptional circumstances, to the High Court.

(5) The damages are limited to three years' average earnings.

(6) The action is an action for negligence, and any defence available at common law (except that of common employment) is good (*a*), as, for instance, contributory negligence (*b*), *volenti non fit injuria* (*c*), or that the workman has contracted himself out of the Act (*d*).

Class of servants to which the Act applies.

It will be perceived that this Act applies only to a limited class of employees. Thus, a grocer's assistant is not a person engaged in manual labour within the meaning of the Act (*e*); nor is the driver of a tramcar (*f*); nor an omnibus conductor (*g*). And it only applies to accidents happening by reason of negligence of the specific kinds enumerated in the Act. It does not abolish the doctrine of common employment generally, nor on the other hand does it give an injured servant a right of action unless he can prove negligence on the part of the master or some fellow-servant of the kind specified.

(*a*) *Per* SMITH, J., in *Weblin* v. *Ballard*, 17 Q. B. D. 122, at p. 125.

(*b*) *Stuart* v. *Evans*, 31 W. R. 706.

(*c*) *Thomas* v. *Quartermaine*, 18 Q. B. D. 685 [C.A.]. See *Yarmouth* v. *France*, 19 Q. B. D. 647.

(*d*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D 357.

(*e*) *Bound* v. *Lawrence*, [1892] 1 Q. B. 226 [C.A.].

(*f*) *Cook* v. *North Metropolitan Tramways Co.*, 18 Q.B.D. 683.

(*g*) *Morgan* v. *London General Omnibus Co.*, 13 Q. B. D. 832 [C.A.].

SECTION III.—THE WORKMEN'S COMPENSATION ACTS. Art. 94.

The Workmen's Compensation Acts, created a new kind of liability by making a master liable to pay compensation at a fixed rate to his servant if he was incapacitated by accident happening to him in the course of his employment, and to those dependent on the servant if he was killed by such accident.

In England the Act of 1897 was somewhat limited in its application. It was extended by the Act of 1900; and in 1906 both those Acts were repealed and the present Act was substituted for them That Act again extended the application of the earlier Act, whilst preserving its main principles.

In India, the Workman's Compensation Act (VIII of 1923) provides similarly for the payment by certain classes of employers to their workmen of compensation for injury by accident.

It must be kept in mind that *liability to pay compensation arises independently of any neglect or wrongful act* on the part of the master or his servants. And, strictly speaking, its consideration does not belong to the law of torts at all. The liability to pay compensation is not one arising out of tort, but is an incident attached by statute to the relation of master and servant. Moreover, the amount payable is fixed by a scale, and depends not on the amount of suffering caused to the workman, or on the expenses caused by his illness, but on the difference between his wage-earning capacity before and after the accident.

ART. 95.—*Liability to Pay Compensation.*

(1) To entitle a workman to compensation he must show *either*—

(A) (i) That he has suffered personal injury by accident, and

(ii) That the "injury by accident" *arose out of his employment*, and

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(iii) That the "injury by accident" *arose in the course of his employment*, and

(iv) That the injury has disabled him for at least one week (according to the law in England) and ten days (according to the law in India) from earning full wages at the work at which he was employed (*a*); *or*

(B) That by reason of his suffering from an "industrial disease," due to the nature of his employment, he has been disabled for at least one week from earning full wages at the work at which he was employed. This includes the consequences of an operation necessitated by an industrial disease (*b*).

(2) Where the injury by accident or industrial disease results in death the workman's dependants are entitled to compensation (*c*). "Dependants" means members of the family who were, in fact, wholly or in part dependent on his earnings (*d*).

Comment.

It must be observed that in this connection the words "*injury*" and "*accident*" are used in a popular sense.

Injury by accident.

"Injury" does not mean "injuria," *i.e.*, an actionable wrong, but physiological injury, such as a broken limb, rupture, wound, or other hurt however caused.

Accident.

"Accident" does not mean "inevitable accident." There is an "injury by accident" if a workman is hurt, whether it be by inevitable accident for which no one is to blame, or be the result of the negligence of a fellow workman, or of the employer, or of the workman who is injured.

(*a*) Workmen's Compensation Act, 1906, s. 1 and Act VIII of 1923, s. 3.

(*b*) *Ibid.*, s. 8; *Russel v. Corser*, [1921] W. N. 5.

(*c*) *Ibid.*, s. 1, Sched. 1, and Act VIII of 1923, s. 4.

(*d*) *Ibid.*, s. 13 and Act VIII of 1923, s. 2 (*d*).

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"Accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed (*a*). And the fact that a man, by reason of his physical debility, is more likely to suffer an accident does not affect the question whether what befell him is to be regarded as an accident or not. Thus when a workman in a very weak and emaciated condition while working in the stokehole of a ship received a heat stroke from the effect of which he died, it was held to be a death by accident (*b*). But accident does not include injury by disease alone not accompanied by any accident.

"Arising out of."

The words "arising out of" indicate the origin or cause of the accident which must be dependent on and connected with the employment, that is due to some cause or risk incidental to the employment. So where a sailor disappeared while on watch, his death was held to be due to an accident arising out of his employment (*c*). Where a cashier, whose duty it was to take large sums of money by train to a colliery, was murdered whilst so employed, it was held that the accident arose out of his employment inasmuch as his duty exposed him to this special risk which was consequently incidental to his employment (*d*). Where a workman was injured by lightning it was held to be an accident arising out of his employment owing to the place and circumstances in which he was employed involving a greater than ordinary risk of injury by lightning (*e*). So where a teamster in the course of his employment was bitten by one of the stable cats, or where an insurance agent, in going from door to door collecting premiums, while in the course of his employment fell down a stair and sustained injuries, or where a quay foreman was assaulted by a clock labourer in the course of his duty of supervision and lost his eye, the accident was held to have arisen out

(*a*) *Per* Lord MACNAGHTEN, *Fenton* v. *Thorley*, [1903] A.C. 443.

(*b*) *Ismay, Imrie & Co.* v. *Williamson*, [1908] A. C. 437.

(*c*) *Owners of SS. Swansea Vale* v. *Rice*, 27 T. L. R. 440.

(*d*) *Nisbet* v. *Rayne and Burn*, [1910] 2 K. B. 689 [C. A.]; approved in *Trim Joint District School Board* v. *Kelly*, [1914] A. C. 667.

(*e*) *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K. B. 32 [C. A.].

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of his employment (*a*). But where a workman was injured in the course of his employment by the tortious act of a fellow-workman **which had no relation to the employment,** the accident was held not to have arisen out of the employment (*b*).

"In the course of."

"A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety" (*c*). So the Act applies where the accident arises on the employers' premises, but at a time when the actual employment has not commenced or after it has terminated (*d*), or during some temporary cessation of work; but does not apply when the accident occurs whilst the workman is going to, or returning from, his work (*e*).

Serious and wilful misconduct.

The fact that the accident was due to the negligence, or even to the misconduct, of the workman is no answer to his claim for compensation. If, however, the accident only results in **temporary disablement,** and was attributable to **serious and wilful misconduct,** he is not entitled to compensation (*f*). It has been held that mere disobedience to rules is not necessarily serious and wilful misconduct, even though it renders the workman liable to prosecution, and though it was such as would entitle the master to dismiss the workman without notice (*g*). A workman was cleaning a machine while in motion, in consequence of which he met with an accident and became totally incapacitated. Near the machine a notice was posted —" No workman is to attempt to clean any

(*a*) *Rowland* v. *Wright*, 24 T. L. R. 852 [C. A.]; *Miller* v. *Refuge Assurance Co., Limited*, [1912] S. C. 37; *Reid* v. *British and Irish Steam Packet Co.*, [1921] 2 K. B. 319. See also *Blake* v. *Head*, 106 L. T. 822; *Murray* v. *Denholm & Co.*, [1911] S. C. 1087; *Manson* v. *Forth and Clyde SS. Co., Limited*, [1913] S. C. 921; *Trim Joint District School* v. *Kelly*, [1914] A. C. 667.

(*b*) *Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796 [C. A.]

(*c*) *Per* Lord LOREBURN, L. C., *Low* or *Jackson* v. *General Steam Fishing Co.*, [1909] A. C. 523, at p. 532.

(*d*) *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K. B. 539 [C. A.]

(*e*) See *Morgan* v. *Guest, Keen and Nettlefolds, Ltd.*, 154 L. T. Jo. 411.

(*f*) Workmen's Compensation Act, 1906, s. 1 (2) (c) and Act VIII of 1923, s. 3.

(*g*) *Johnson* v. *Marshall, Sons & Co.*, [1906] A. C. 409.

machine while it is in motion." It was held that the accident arose in the course of employment notwithstanding the workman's disobedience to genuine prohibition (*a*). Art. 95.

All persons who work under contract of service or apprenticeship are "workmen" entitled to the benefit of the Act (*b*), except: To whom the Act applies.

(*a*) persons **not engaged in manual labour** (such as clerks) **and earning more than £250** (in England) and Rs. 300 (in India), a year;

(*b*) persons whose **employment is casual** and are *not* employed in the employer's business, *e.g.*, a domestic charwoman not having a regular engagement;

(*c*) members of **the employer's family** dwelling in his house;

(*d*) **out-workers;**

(*e*) members of a **police force;**

(*f*) persons in the **naval or military service of the crown** (*c*).

The scale of compensation and the mode of working it out is set out in detail in English and the Indian Acts. The amount to which the workman, is, or, in case of death, his defendants are, entitled, depends primarily on his wages. In the case of total or partial incapacity he gets a weekly sum so long as the incapacity lasts, not exceeding half his average weekly earnings during the preceding twelve months. In the case of death his dependants get a lump sum in no case exceeding £300 in England and Rs. 2500 in India. Scale of compensation. Procedure.

No action lies for compensation (*d*). If the right to compensation or the amount of compensation is disputed the matter is decided in the first instance by an arbitrator, who may be, and generally is, a county court judge. From him there is an appeal direct to the Court of Appeal. And a writ of prohibition will not lie against a county court judge sitting as an arbitrator under the Act (*e*). Alternative remedies.

(*a*) *Estler Brothers* v. *Phillips*, 91 L. J. K. B. 470.

(*b*) *Reid* v. *British and Irish Steam Packet Co., Limited*, [1921] 2 K. B. 319.

(*c*) Workmen's Compensation Act, 1906, ss. 9, 13 and Act VIII of 1923, s. 2 (n).

(*d*) See Act VIII of 1923, s. 19(2).

(*e*) *Turner* v. *Kingsbury Collieries Limited*, [1921] W. N. 184.

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When the injury is such that there is a cause of action against the employer at common law or under the Employers' Liability Act, the workman must elect whether he will proceed for compensation or bring an action. The employer cannot be compelled to pay both damages and compensation (*a*). But if he fail in his action he can still proceed under the Act, provided application for a compensation award is made either before final judgment or pending appeal, but in the latter case, if compensation is awarded, the appeal must be abandoned (*b*).

(*a*) *Ibid.*, s 1 (2) ; and Act VIII of 1923, s. 3(5).

(*b*) *Neale* v. *Electric and Ordnance Accessories Co , Limited*, [1906] 2 K. B. 558 ; and generally, see Willis' Workmen's Compensation Act.

CHAPTER X.

OF PRIVATE INJURY FROM PUBLIC NUISANCES.

THE term "nuisance" is used to include two distinct causes of action. A **public nuisance** is an infringement of a public right and an injury to the public, for which the proper remedy is either criminal proceedings or an information by the Attorney-General on the part of the public, asking for an injunction to restrain the continuance of the public nuisance. It is only when there is some **special injury to an individual** that it is the subject of an action for damages.

Meaning of "public nuisance" and "private nuisance."

A *private nuisance*, on the other hand, is some injury to the property of an individual. It is not an injury to the public.

In some cases, however, the line between public and private nuisance is rather fine. Thus, such an act as carrying on a noisy trade, or emitting foul gases, though usually only a private nuisance, may amount to a public nuisance if, by reason of the injury done to the neighbourhood, it interferes with the comfort and enjoyment of the public generally, or at least of all who come within range of it (*a*).

ART. 96.—*Description of Public Nuisances.*

(1) A public nuisance is some unlawful act, or omission to discharge some legal duty, which act or omission endangers the lives, safety, health, or comfort of the public, or by which the public are obstructed in the exercise of some common right.

(2) No action can be brought for a public nuisance by a private person unless he has suffered some substantial particular damage beyond that suffered by the public generally.

(*a*) See *Soltau* v. *De Held*, 2 Sim. (N.S.) 133.

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The Indian Penal Code.

In India public nuisance is indictable as an offence under the Penal Code: "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage" (*a*).

Kinds of public nuisances.

Public nuisances consist not only of those acts or omissions which interfere with definite public rights, such as the right of the public to use a highway, but also of nuisances which endanger the health, safety, or comfort of the public generally (*b*).

So, where a sanitary authority so manage their sewers as to affect the health or comfort of the public or the inhabitants of a large district, they commit a public nuisance in respect of which the Attorney-general is the proper party to take proceedings (*c*). As also does a person who allows rubbish or filth to be deposited on his land so as to be injurious to the inhabitants of the neighbourhood (*d*).

Nuisances to highways.

Nuisances to highways consist in any obstruction of the highway, or anything which renders the use of the highway unsafe or incommodious for the public, as physically stopping it up, or making excavations on, or immediately adjoining it, or maintaining ruinous fences or buildings immediately adjoining it.

Examples. Excavations.

(1) Thus, where a man makes an excavation adjoining a highway, and keeps it unfenced, he commits a public

(*a*) Act XLV of 1860, s. 268.

(*b*) See *R.* v. *Phiraya Mal*, 9 P. R. 1904 (working rice-husking machine at night in a residential quarter of the city); *R.* v. *Umesh Chandra Kar*, 14 Cal. 656 (placing a bamboo stockade in a tidal navigable river); *R.* v. *Virappa Chetty*, 20 Mad. 433 (appropriating part of street by building over it); *R* v. *Rupnarayan Dutt*, 18 W. R 38 (filling up a public drain); *R.* v. *Keshaji Ahmed*, 1 Weir, 239 (letting loose cattle at night on a road); *R.* v. *Vasudeva Chetty*, 1 Weir, 242 (making atmosphere noxious to health by throwing dust); *R.* v. *Raja Saib*, 1 Weir 243 (trotting rams in a market place).

(*c*) See *Att.-Gen* v. *Luton Local Board*, 2 Jur. (N.S.) 180; *Att.-Gen.* v. *Birmingham Town Council*, 6 W. R 811; *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*d*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.]

nuisance and is liable for any injury occasioned to a person falling into it (*a*). Art. 96.

(2) So also, traders who keep vans in a street for an unreasonable time for the purpose of loading and unloading, cause an unreasonable obstruction which may amount to a public nuisance (*b*).

Ruinous premises.

(3) To permit premises adjoining a highway to fall into a ruinous condition is a public nuisance entitling a person injured thereby to damages. Thus, where the defendant had a heavy lamp projecting over the highway, which by reason of want of repair fell on the plaintiff and injured her, it was held that the defendant was liable (*c*). But if the injury is sustained by an invitee who is not on the high way but on the defendant's premises at the time he is injured, the defendant is only liable if he knew or ought to have known of the defective condition which gave rise to the injury (*d*).

Dangerous fences.

(4) So also, a person who maintained a low spiked wall immediately adjoining a highway was held liable for injuries caused to a little girl who stumbled against the spikes whilst using the highway (*e*). And, similarly, where a boy attempted wrongfully to climb a rotten fence adjoining a highway, and the fence fell upon and injured him, he was held to be entitled to recover, because the fence was a nuisance, and he only did what might have been expected of a boy (*f*). In *Mullan* v. *Forrester*, a wall abutting on a public highway was blown down by a storm and killed three persons, and in an action for damages against the owner of the wall, it was held that the wall being a nuisance, the plaintiff ought to prove that the defendant knew or ought reasonably to have known of its defective condition. It does not appear however from the report that the court actually decided that the wall was a nuisance (*g*).

(*a*) *Barnes* v. *Ward*, 9 C. B. 392 ; *Vithaldas* v. *Municipal Commissioners of Bombay*, 4 Bom. L. R. 914 ; *Corporation of the Town of Calcutta* v. *Anderson*, 10 Cal. 445 ; *Narayan Jeta* v. *Municipal Commissioners of Bombay*, 16 Bom. 254.

(*b*) *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276 [C. A.]

(*c*) *Tarry* v. *Ashton*, 1 Q. B. D 314.

(*d*) *Pritchard* v. *Peto*, [1917] 2 K. B. 173.

(*e*) *Fenna* v. *Clare*, [1895] 1 Q. B. 199. See *Jayammal* v. *Madras and Southern Mahratta Ry. Co., Ltd.*, 46 Mad. 929.

(*f*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320 [C. A.].

(*g*) [1921] 2 I. R. 412.

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Excavations not adjacent to roads.

(5) An excavation on land not so near to a highway as to be dangerous to persons lawfully using the highway is not a nuisance, and a trespasser has no right of action if he falls into it (*a*).

Justification of nuisances.

(6) A public nuisance may be authorised by statute (*b*), but the right to do what amounts to a public nuisance cannot be acquired by prescription or long user (*c*), or justified on the ground that it is in some respects a convenience to the public (*d*). So the mere fact that a nuisance to a highway has existed for a long time is no defence. In order to justify, it must be shown to have existed at the time when the highway was dedicated to the public, so that it may be inferred that the highway was dedicated subject thereto. Thus, a highway may be dedicated subject to the right to plough it up at intervals (*e*), or to hold markets or fairs on it (*f*), or to the right of an adjoining owner to maintain in the footway a cellar flap or grating (*g*). But after the public have acquired the highway, no right to do these things can be gained except by statute.

ART. 97.—*Public Nuisance only Actionable in respect of Particular Damage.*

To enable a private person to bring an action for damages in respect of a public nuisance, he must prove either—

(a) That he has suffered some substantial damage peculiar to himself in his person or trade or calling, and different in kind from the damage suffered by the public (*h*); or

(*a*) See *Hounsell* v *Smyth*, *ante*, 29 L. J. C. P. 203.

(*b*) *R.* v. *Pease*, 4 B. & Ad. 30; *ante*, Art. 10.

(*c*) *Municipal Commissioners of the Suburbs of Calcutta* v. *Mahomed Ali*, 16 W. R. Cr. 6; 7 B. L. R. 499.

(*d*) *R.* v. *Train*, 2 B. & S. 640; *R* v. *Ward*, 4 A. & E. 384.

(*e*) *Arnold* v. *Blaker*, L. R. 6 Q. B. 433 [Ex. Ch.].

(*f*) *Elwood* v. *Bullock*, 6 Q. B. 383; *Att.-Gen.* v. *Horner*, 11 App. Cas. 66.

(*g*) *Fisher* v. *Prowse*, 2 B. & S. 770; *Robbins* v. *Jones*, 15 C. B. (N.S.) 221.

(*h*) *Baroda Prasad* v. *Gora Chand*, 12 W. R. 160; *Raj Laki Debi* v. *Chandra Kant Choudri*, 14 W. R. 173; *Bhagirath* v. *Gokul*

(*b*) That the public nuisance is also an interference with some private right or property of his (*a*). Art. 97.

Comment.

The damage to fall within the first part of this rule must be different in kind, and not merely in degree, from that suffered by the public generally. Thus obstructing a highway is a public nuisance. A person who is merely prevented from using the highway suffers only the same damage as any other member of the public (*b*). But a person, who in using the highway suffers *personal injuries* by reason of the obstruction, suffers damage peculiar to himself, and in respect thereof he has a right of action (*c*).

So, too, has a person whose business is interfered with by reason of customers being deterred from getting to his shop (*d*), or by reason of his business premises being rendered dark or less commodious (*e*).

Again, an obstruction to a highway may also be an interference with some private right, or some property of the plaintiff, so that in that way also he suffers damage of a

Chandra, 18 W. R. 58; *Bhagirath Das* v. *Chandi Charan*, 22 W. R. 463; *Parvati Charan* v. *Kali Nath*, 6 B. L. R. App. 73; *Chuni Lal* v. *Ram Kishen Sahu*, 15 Cal. 460 (F. B.); *Adamson* v. *Armugam*, 9 Mad. 463; *Siddeswara* v. *Krishna* 14 Mad. 177; *Saktu* v. *Ibrahim Aga*, 2 Bom. 457; *Kazi Sujauddin* v. *Madhavdas*, 18 Bom 693; *Virupaxappa Fakirappa* v. *Sherif Sab Mulla*, 11 Bom. L. R. 372; 2 I. C. 494; *Karim Baksh* v. *Budha*, 1 All. 249; *Ramphail Rai* v. *Raghnandan Prasad*, 10 All. 498; *Gehanaji* v. *Ganpati*, 2 Bom. 469 (note); *Abzul Miah* v. *Navzi Mahomed*, 22 Cal 551; *Mohomed Alam* v. *Dilbar Khan*, 5 C. W. N. 285; *Bukan Lal* v. *Mir*, 2 N. L. R. 110. But on an improper order prohibiting a party from using a public road for procession, an action will lie without special damage; *Muthaya Reddi* v. *Sudalai Muthu Nadar*, 8 M. L. T. 114; 20 M. L. J. 119; 5 I. C. 902; *Kandasami Mudaly* v. *Subbaroya Mudaly*, 32 Mad. 478. See also *Satagopa Chariar* v. *Rama Rao*, 26 Mad. 376; *Baslingappa* v. *Dharmappa*, 34 Bom. 571; *Rajnarain* v. *Ekadasi Bag*, 27 Cal. 793.

(*a*) *Fazal Hak* v. *Maha Chand*, 1 All. 557; *Fatehyab Khan* v. *Mahomed Yusuf*, 9 All. 434; *Tota* v. *Surdal Singh*, 10 All. 553; *Bhagwan Singh* v. *Narottam Singh*, 31 All. 444; *Ramchandra* v. *Jotiprasad*, 33 All. 287; *Gangadin* v. *Jagat Tewari*, 2 A. L. J. 1026; *Mahomed Abdul Hafiz* v. *Latif Husain*, 24 Cal. 524.

(*b*) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316.

(*c*) *Barnes* v. *Ward*, 9 C. B. 392.

(*d*) *Fritz* v. *Hobson*, 14 Ch. D. 542.

(*e*) *Benjamin* v. *Storr*, L. R. 9 C. P. 400.

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kind peculiar to himself. The right of access to a highway from adjoining property is a private right quite distinct from the public right of using the highway, and accordingly an obstruction which cuts off access to a highway is actionable as causing particular damage (*a*).

Abatement.

Any person may abate a public nuisance by which he is obstructed in the exercise of a public right by removing the obstruction so far as is reasonably necessary to enable him to exercise the right interfered with; but he cannot do more than this. So, if there is an obstruction in a highway, a person using the highway may *only interfere with it as far as is necessary to exercise his right of passing along the highway*, and if there is room to pass by without removing the obstruction, he has no right to interfere with it (*b*), and may be liable to the owner if he damages the property by interfering with it (*c*).

The English rule that an action for the obstruction of a highway is not maintainable unless special damage is alleged and proved, is applicable to India, and has been re-enacted as s. 91 of the Civil Procedure Code, 1908. The Advocate-General, or two or more persons having obtained the consent in the writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case (*d*).

ART. 98.—*Liability of Owner or Occupier for Public Nuisances.*

(1) If a person is injured by reason of a public nuisance caused by the want of repair or condition of premises adjoining a highway, the

(*a*) *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662.

(*b*) *Dimes* v. *Petley*, 15 Q. B 276; *Davies* v. *Mann*, 10 M. & W. 546.

(*c*) *Hope* v. *Osborne*, [1913] 2 Ch. 349; *Mills* v. *Broker*, [1919] 1 K. B. 555.

(*d*) Section 91, Act V. of 1908. See *Advocate-General of Bombay* v. *Haji Ismail Hassam*, 12 Bom. L. R. 274; 5 I. C. 213; *Khaji Syyad* v. *Ediga Narasimhappa*, 23 M. L. J. 539; 12 M. L. T. 367; 16 I. C. 962. See *Sheikh Chand* v. *Laxman*, 12 N. L. R. 130; 36 I. C. 534; *Tirath Ram* v. *Md. Abdul Rahim*, 73 I. C. 616.

occupier is *primâ facie* liable and not the owner (unless he is also the occupier) (*a*). In particular the owner is *not* liable if he lets the premises to a tenant who agrees to repair them, unless he knows of the nuisance at the time of the letting and does something which amounts to an authority to continue it (*b*).

(2) The **owner is liable** (i) if he has contracted with the tenant to repair and the nuisance is due to want of repair (*c*); (ii) if he has let the premises in a ruinous condition and the tenant has not agreed to repair (*d*).

(3) Where the premises are in the occupation of a tenant **from year to year** there is, in effect, reletting each year, and (unless the tenant has agreed to repair) the landlord is liable for damage caused by a nuisance, if since the creation of the nuisance and before the damage he might have determined the tenancy and did not, for in that case he "lets the premises in a ruinous condition" (*e*).

(4) When premises are let on a **weekly tenancy** there is not a reletting at the end of each week so as to make the landlord liable for nuisances arising since the original letting, unless he has contracted with the tenant to do repairs. For such nuisances the tenant and not the landlord is liable (*f*).

(*a*) *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311; but see *Pritchard* v. *Peto*, [1917] 2 K. B. 173.

(*b*) *Pretty* v. *Bickmore* L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658; *Harris* v. *James*, 45 L. J. Q. B. 545.

(*c*) *Payne* v. *Rogers*, 2 H. Bl. 350; *Broggi* v. *Robbins*, 14 T. L. R. 439.

(*d*) *Gandy* v. *Jubber*, 5 B. & S. 78; but see Pollock on Torts, 11th Ed. p. 436, note (*g*).

(*e*) *Ibid.*

(*f*) *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

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Comment.

The principle is that the occupier is primâ facie liable. An owner not in occupation is only liable if he has in some way authorised the continuance of the nuisance. He may authorise the continuance of the nuisance if, knowing of its existence, he lets the premises without repairing or requiring the tenant to repair, or if he keeps control of the premises by undertaking to repair himself.

So, too, the owner and occupier of vacant land is liable if he knows it is being so used by the public as to become a public nuisance, and does not take reasonable steps to prevent such a user, even though he may not himself have actively done anything to cause the nuisance (*a*).

But neither owner nor occupier is liable for a nuisance created by some third person without his knowledge and which he could not by reasonable care have prevented (*b*).

Illustrations.

(1) The defendant let premises to a tenant who covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous. A passer-by, in consequence, fell into the aperture, and was injured :—*Held*, that the obligation to repair being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And KEATING, J., said : "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorised the continuance of this coal shoot in an insecure state ; for instance, that he retained the obligation to repair the premises ; that might be a circumstance to show that he authorised the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair" (*c*).

(2) A. was injured by the giving way of a grating in a public footway, which was used for a coal shoot, and for letting light into the lower part of the premises adjoining. The premises were at the time under lease to a tenant who covenanted to repair. At the time of the demise the grating was insecure, but there was no evidence that the landlady had any knowledge of its unsafe state, and the jury found she was not to blame :—*Held*, that as the premises were

(*a*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560 [C. A.].

(*b*) *Barker* v. *Herbert*, [1911] 2 K. B. 633.

(*c*) *Pretty* v. *Bickmore*, L. R. 8 C. P. 401, and see *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311.

demised, and there was no longer any obligation on the landlord to keep them in repair, the plaintiff had no cause of action against the landlady. It was intimated that if the landlady had, at the time of the demise, known of the defect and done nothing to remedy it, she might have been liable as well as the tenant (*a*).

Liability of landlord to tenant.

(3) The above rules only apply to nuisances (*b*). They have no application as between landlord and tenant, or landlord and the guests of a tenant. Apart from contract, a landlord is not bound to keep the demised premises in repair as regards either his tenant, or the guests of his tenant (*c*). But a landlord who retains portions of buildings the other portions of which are let to different tenants, if the portions he retains are not used by the tenants his liability to keep these portions in repair is absolute (*d*). Where the portions retained by the landlord are used by the tenants and their guests, the liability of the landlord (apart from contract and statute) is merely the duty he has towards licensees—to warn of any concealed danger of which he knows, *i.e.*, not to make a trap (*e*). As to premises let subject to the provisions of the House and Town Planning Act, 1909, ss. 14 and 15, the implied obligations to repair is in favour of the tenant *alone*, not for the benefit of his wife (*f*) or daughter (*g*), but to a claim of the tenant himself for damage suffered from non-fulfilment of the statutory obligation to repair it is no answer that the danger was obvious (*h*).

(4) When some boys broke the railings of an area of a vacant house, so that the area was a danger to persons using the street, it was held that the owner was not liable as he did not know of the broken railing and had used reasonable care to prevent the railings becoming a nuisance. An area is not a thing a man keeps at his peril (*i*).

(*a*) *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658.
(*b*) As to private nuisances, see Chapter XI. *post*.
(*c*) *Lane* v. *Cox*, [1897] 1 Q. B. 415 [C. A.]. See also Art. 81 *supra*.
(*d*) *Hart* v. *Rogers*, (1915) 32 T. L. R. 150.
(*e*) *Hugget* v. *Miers*, [1908] 2 K. B. 278; *Lucy* v. *Bawden* 1914 2 K. B. 318.
(*f*) *Middleton* v. *Hall*, (1913) 108 L. T. 804.
(*g*) *Ryall* v. *Kidwell & Son*, [1914] 3 K. B. 135.
(*h*) *Dunster* v. *Hollis*, [1918] 2 K. B. 795.
(*i*) *Barker* v. *Herbert*, [1911] 2 K. B. 633.

CHAPTER XI.

PRIVATE NUISANCES.

SECTION I.—NUISANCE TO CORPOREAL HEREDITAMENTS.

ART. 99.—*General Liability.*

(1) A private nuisance is some unauthorised user of a man's own property causing damage to the property of another, or some unauthorised interference with the property of another, causing damage (*a*).

(2) Any private nuisance whereby sensible injury is caused to the property of another, or, whereby the ordinary physical comfort of human existence in such property is **materially** interfered with, is actionable.

(3) Liability for nuisance is independent of negligence.

(4) No use of property, which would be legal if due to a proper motive, can be a nuisance merely because it is prompted by a motive which is improper or ever malicious (*b*).

Comment.

The law with regard to private nuisances mainly depends upon the maxim *sic utere tuo ut alienum non lædas*. Not that that maxim can receive a literal interpretation, for a man may do many acts which may injure others (*ex. gr.*), build a house which may shut out a fine view theretofore enjoyed by a neighbour except where a right to such view is reserved by covenant (*c*); but such acts are necessarily

(*a*) *Stearn* v. *Prentice Brothers*, [1919] 1 K. B. 394.

(*b*) *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.

(*c*) *Browne* v. *Flower*, [1911] 1 Ch. 219.

incidental to the ownership of property. The acts referred to in the maxim are acts which go beyond the recognised legal rights of a proprietor. Art. 99.

The owner of land containing underground water which percolates by undefined channels, and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land, so as to deprive his neighbour of it (*a*). An owner diverted underground water percolating in undefined channels, not to improve his own land, but maliciously in order to injure his neighbours by depriving them of their water supply and to compel them to buy him out. This unneighourly conduct, however, was held to be lawful, because it was an act rightful in itself, and therefore not wrongful when done maliciously (*b*). Lawful act done with malicious motive.

(1) In the leading case of *Tipping* v. *St. Helens Smelting Co.* (*c*), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action ; for the killing of the shrubs was an injury to the property. Illustrations. Fumes.

(2) So, too, it was said, in *Crump* v. *Lambert* (*d*), that smoke, unaccompanied with noise or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance ; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence in the plaintiff's property. Noisy and noisome trades.

(3) Where the alleged nuisance consists of acts which interfere with the reasonable enjoyment of property, the inconvenience must be substantial. The standard is referred to in *Bland* v. *Yates* (*e*) as "a serious inconvenience and interference with the comfort of the occupiers of the dwelling house according to notions prevalent among reasonable English men and women." Interference with enjoyment of property.

(4) The collection of a crowd of noisy and disorderly people outside grounds in which entertainments with music and fireworks are being given for profit, may constitute a Noisy entertainments.

(*a*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349.

(*b*) *Bradford Corporation* v. *Pickles*, [1895] A. C 587.

(*c*) L. R. 1 Ch. 66.

(*d*) L. R. 3 Eq. 409 ; *Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy*, 8 Bom. 35 ; *Sadasiva* v. *Rangappa*, [1918] M. W. N. 293.

(*e*) 58 Sol. Jo. 612,

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nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*a*).

So, too, may the collection of large and noisy crowds outside a club kept open till 3 A. M. for pugilistic encounters (*b*).

(5) So, too, the turning of the ground floor of a London house into a stable, so that the neighbours are disturbed all night by the noises of the horses, may constitute a nuisance (*c*).

Other examples.

(6) Other examples of nuisances to corporeal hereditaments, are, permitting buildings to become ruinous so as to fall on one's neighbour's land (*d*), overhanging eaves from which the water flows on to another's property (*e*); or overhanging trees (*f*), or pigsties creating a stench, erected near to another's house, or the collecting a quene so that the entrance to plaintiff's premises was interfered with (*g*), or the construction of horse stables (*h*), or fouling an adjoining municipal drain by discharging into it what was not intended to be carried off (*i*). And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are a nuisance if serious discomfort is caused (*j*). So, also, is a small-pox hospital so conducted as to spread infection to neighbouring houses (*k*).

(*a*) *Walker* v. *Brewster*, L. R. 5 Eq. 25. See also *Inchbald* v. *Robinson*, *Inchbald and Barrington*, L. R. 4 Ch 388; *Lyons, Son & Co.* v. *Gulliver and Capital Syndicate, Limited*, 29 T. L. R. 428; *Hari* v. *Vithal*, 8 Bom. L. R. 89. See also *Jawand Singh* v. *Muhammad Din*, 89 P. W. R. 1920.

(*b*) *Bellamy* v *Wells*, 60 L. J. Ch. 156. And see also *Barber* v. *Penley*, [1893] 2 Ch. 447, and *Jenkins* v. *Jackson*, 40 Ch. D. 71.

(*c*) *Ball* v. *Ray*, L. R. 8 Ch. 467.

(*d*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377.

(*e*) *Bathishill* v. *Reed*, 25 L. J. C. P. 290.

(*f*) *Lemmon* v. *Webb*, [1895] A. C. 1; *Smith* v. *Giddy*, [1904] 2 K. B. 448; *Hari Krishna* v. *Sankar Vithal*, 19 Bom. 420; *Behari Lal* v. *Ghisa Lal*, 29 All. 499; *Laxmi Narayan Banerjee* v. *Tara Prasanna Banerjee*, 31 Cal. 944.

(*g*) *Lyons* v. *Gulliver*, [1914] 1 Ch. 631.

(*h*) *Bai Bikaji* v. *Peroze Shaw*, 40 Bom. 401.

(*i*) *Galstaun* v. *Doonia Lal Seal*, 32 Cal. 697.

(*j*) *Street* v. *Tugwell*, Selwyn's Nisi Prius, 13th ed., 1070.

(*k*) *Metropolitan Asylums District* v. *Hill*, 6 App. Cas. 193.

ART. 100.—*Reasonableness of Place.* Art.

(1) That which is primâ facie a nuisance can not be justified by the fact that it is done in a proper and convenient place and is a reasonable use of the defendant's land (*a*).

(2) Where the acts complained of are nuisances by reason of **injury to property,** it is no defence that the locality is one devoted to trades which cause such injury (*b*).

(3) But with regard to acts which are nuisances by reason of their interfering with the **enjoyment of property,** as distinguished from those which damage the property itself, the circumstances of the locality must be taken into consideration (*c*).

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it. Thus, where the defendant used his land for burning bricks and so caused substantial annoyance to his neighbour, it was held that it was no defence that it was done in a proper and convenient spot, and was a reasonable use of the land (*a*). At the same time a person is entitled to use his land or house in the ordinary way in which property of the like character is used, and an adjacent owner must put up with such noises and inconveniences as may reasonably be expected from his neighbours, such as the noise of a pianoforte, or the noise of children in their

(*a*) *Bamford* v. *Turnley*, 31 L. J. Q. B. 286 [Ex. Ch.].

(*b*) *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

(*c*) *Ibid.* and *Polsue and Alfieri, Limited* v. *Rushmer*, [1907] A. C. 121; *Bland* v. *Yates*, 58 Sol. Jo. 612; *De Keyser's Hotel, Limited* v. *Spicer*, 30 T. L. R. 257; and note the decision on requisitioning hotels, *Att.-Gen.* v. *De Keyser's Hotel, Limited*, 89 L. J. Ch. 417.

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nursery, which are noises we must reasonably expect, and must, to a large extent, put up with (*a*).

(2) In *St. Helens Smelting Co.* v. *Tipping* (*b*), Lord WESTBURY said: "In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces **material injury to the property**, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of **sensible personal discomfort.** With regard to the latter —namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town, and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury *to property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

In *Rushmer* v. *Polsue and Alfieri Limited* (*c*), WARRINGTON J., said that for the purpose of coming to a decision whether

(*a*) See *Ball* v. *Ray*, L. R. 8 Ch. 467; *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685.

(*b*) 11 H. L. Cas. 650.

(*c*) 21 T. L. R. 183, affirmed in House of Lords, [1907] A. C. 121.

working a noisy printing machine by night in Gough Square (a neighbourhood devoted to the printing trade) was a nuisance to a residence adjoining the square, he was to look not at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular with regard to the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations; but that if after taking these circumstances into consideration, he found a serious and not merely a slight interference with the plaintiff's comfort, he thought it his duty to interfere. And acting on this principle, he granted an injunction restraining the defendants from using their machine, although the machine was one of an improved type, quieter than those generally used, and was properly used It was enough that in fact it created a nuisance. His decision was affirmed in the House of Lords (*a*). Art. 101.

ART. 101.—*Plaintiff coming to the Nuisance.*

It is no answer to an action for nuisance, that the plaintiff knew that there was a nuisance and yet went and lived near it (*b*).

Or in the words of BYLES, J., in *Hole* v. *Barlow* (*c*). "It used to be thought that if a man knew that there was a nuisance and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house.

So where a confectioner had for many years used a pestle and mortar in his kitchen in Wigmore Street, and Illustrations.

(*a*) These principles were also applied by the same Judge in *Bland* v. *Yates*, 58 Sol. Jo. 612; *De Keyser's Hotels, Limited* v. *Spicer Brothers*, 30 T. L. R. 257.

(*b*) *St. Helen Smelting Co.* v. *Tipping*, *supra*.

(*c*) 27 L. J. C. P. 207, at p. 208.

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then the plaintiff, a physician in Wimpole Street, built a consulting room in his back garden against the confectioner's kitchen, and the noise from the pestle and mortar was a nuisance to the consulting room, it was held that, although the plaintiff had come to the nuisance, he was nevertheless entitled to complain of it as a nuisance. But the right to commit a nuisance may be acquired by having committed the nuisance complained of for upwards of twenty years, not merely the cause but the nuisance must have been committed for that period (*a*).

ART. 102.—*Liability of Occupier and Owner for Nuisances.*

(1) The **occupier** of premises upon which a nuisance is created to adjoining property is primâ facie liable. There is no liability upon an owner as such (*b*).

(2) An owner who is not in occupation may be liable if he has originally created the nuisance and let the premises with the nuisance complained of, or, when the nuisance is due to want of repair, has permitted the premises to get out of repair, and lets them with knowledge of the want of repair, or has, as between himself and his tenant, undertaken the repairs (*c*).

(3) Where the nuisance is caused, not by the state of the premises themselves, but by their user, an owner who is not in occupation is not liable for the nuisance, although he has let the premises in such a condition that they

(*a*) *Sturges* v. *Bridgman*, 11 Ch. D. 852 [C. A.]; and see *Crossley & Sons, Limited* v. *Lightowler*, L. R. 2 Ch. 478. As to the effect of an established business being declared by subsequent statute to have been an "offensive trade", see *Mayo* v. *Stazicker* [1921] W. N. 64.

(*b*) *Russell* v. *Shenton*, 3 Q. B. 449.

(*c*) *Rosewell* v. *Prior*, 2 Salk. 460; *Todd* v. *Flight*, 9 C. B. (N.S.) 377.

are capable of being so used as to cause a nuisance (*a*). Art. 103.

(1) Generally the person who causes or authorises the nuisance is liable, so a person who creates a nuisance on his land and then lets it with the nuisance, is liable if the nuisance is continued (*b*). And the purchaser or lessee also may be liable for continuing the nuisance (*c*).

So, too, an owner of land who lets a house and undertakes, as between himself and his tenant, to repair, is liable if, by reason of his not repairing, a nuisance is caused to adjoining premises (*d*). But an owner who is not occupier is not liable unless he can be fixed with liability in one of these ways (*e*).

(2) If a person builds a factory with a chimney on his land, and lets the land, he does not thereby authorise the user of the chimney so as to be a nuisance. It is not the existence of the chimney which is a nuisance, but its use, and for this the person who uses the chimney, not the owner of the land, is liable (*f*). So, also, if a third person against my will puts something on my land which is a nuisance to my neighbour, I am not liable, for I have not caused the nuisance (*g*).

ART. 103.—*Prescription to Commit a Nuisance.*

The right to commit a private nuisance may be acquired by grant or prescription.

An owner of land may by express grant give to another a right to do that which would otherwise be a nuisance, *e.g.*, to discharge foul water on to his land. If a person has been actually committing a nuisance for a great many years without objection, it is reasonable to Illustrations.

(*a*) *Rich* v. *Basterfield*, 4 C. B. 783.

(*b*) *Rosewell* v. *Prior*, 2 Salk. 460.

(*c*) *Penruddock's Case*, 5 Co. Rep. 100 b.

(*d*) *Todd* v. *Flight*, 9 C. B. (N.S) 377.

(*e*) *Russell* v. *Shenton*, 3 Q. B. 449.

(*f*) *Rich* v. *Basterfield*, *supra*.

(*g*) *Saxby* v. *Manchester and Sheffield Rail. Co.*, L. R. 4 C. P. 198.

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presume that he has in some way acquired a right to do so, and at common law juries were directed to **presume a lost grant** in such cases. But juries were not bound to, and in some cases refused to, presume a lost grant which they did not believe ever existed in fact (*a*).

The right of one owner of land to commit nuisances of this kind in respect of the land of another is a right in the nature of an easement, being not a mere personal right, but a right granted, or presumed to have been granted, by the owner of land or his predecessors in title (so as to bind all subsequent owners), to the owner of the land for whose benefit it is created for the benefit of him and all subsequent owners.

Now, by the Statute Law of England and India it is seldom necessary to presume a lost grant, for where an easement which might at common law be claimed by lost grant has been actually enjoyed by a person claiming it as a right without interruption for **twenty years immediately before action** brought, that is generally enough to establish the right, unless it has been enjoyed by consent or agreement (*b*).

Illustrations.

(1) Accordingly, now a person may by twenty years' user gain a right to pour foul water into another's stream (*c*).

(2) It must be noted that the period of twenty years only begins to run from the time when the acts complained of begin to be a nuisance. So when the defendant had for more than twenty years made a noise which did not amount to an actionable nuisance to his neighbour, because the

(*a*) The law as it stood before the Prescription Act, "put an intolerable strain on the consciences of judges and jurymen," (*per* LORD MACNAGHTEN in *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229, at p. 236).

(*b*) Prescription Act, 2 & 3 Will. 4. c. 71. The period is in some cases forty years, as when the land of the servient tenement (that is the land whose owner is supposed to have made the grant) has been owned by some person who could not lawfully make a grant to bind his successors in title, such as a tenant for life If there has been forty years' enjoyment the right can only be defeated by showing that it was enjoyed under an express grant or consent in writing. No grant can now be presumed from enjoyment for a less period than twenty years. See also the Indian Limitation Act (IX of 1908); Indian Easement Act, (V of 1882).

(*c*) *Wright* v. *Williams*, 1. M. & W. 77; and see *Gardener* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229.

neighbour's land was not built on, he acquired no easement by so doing; and accordingly when the plaintiff built a consultation room on the land affected by the noise, and the noise then began to be a nuisance, it was held that the defendant had not acquired a right under the Prescription Act (*a*).

(3) A person can only acquire by prescription a right to do acts of the same kind and amount as he has used for the period of enjoyment. So if he has for twenty years poured a certain amount of filth of a particular kind into a stream, he can only prescribe to discharge filth of that amount and of that kind, and is not justified in pouring in any larger amount, or filth of a different kind (*b*).

No prescriptive right can be acquired to compel a man to submit to the penetration of his lands, by the roots of a tree planted on his neighbour's soil (*c*); nor can a right of easement, to hold a *kirtan* or religious concert on another's land at particular times of the year, though there may be such a right by custom (*d*). A right to discharge smoke through some holes in a wall over a neighbour's land can be acquired by prescription (*e*).

ART. 104.—*Remedy of Reversioners for Nuisances.*

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*f*).

Illustrations.

(1) Any **permanent** obstruction of an incorporeal right, as of way, air, light, water, etc., may be an injury to the reversion (*g*).

(*a*) *Sturges* v. *Bridgman*, 11 Ch. D. 852 [C. A.].

(*b*) *Crossley & Sons, Limited* v. *Lightowler*, L. R. 2 Ch. 478.

(*c*) *Laxmi Narayan Banerjee* v. *Tara Prasanna Banerjee*, 31 Cal 944.

(*d*) *Gopinath Jen Thakur* v. *Radha Kanta*, 13 C. W. N. 1002; 1 I. C. 108.

(*e*) *Kashinath* v. *Narayan*, 22 Bom. 831.

(*f*) *Bedingfield* v. *Onslow*, 3 Lev. 209.

(*g*) *Kidgill* v. *Moor*, 9 C. B. 364; *Metropolitan Association* v. *Petch*, 27 L. J. C, P. 330; *Greenslade* v. *Halliday*, 6 Bing 379.

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(2) But an action will not lie for a nuisance of a mere transient and temporary character (*a*). Thus, a nuisance arising from noise or smoke will not support an action by the reversioner (*b*). Some injury to the reversion must always be proved, for the law will not assume it (*c*).

ART. 105.—*Remedy by Abatement.*

(1) A person injured by a nuisance may abate it, that is remove that which causes the nuisance, provided that he commits no riot in the doing of it, nor occasions any damage beyond what the removal of the inconvenience necessarily requires (*d*).

(2) Where there are alternative ways of abating a nuisance the less mischievous must be chosen (*e*).

(3) A person cannot justify doing a wrong to an innocent third party or to the public in abating a nuisance. So it seems that entry on the lands of an innocent third party cannot be justified (*f*).

(4) In order to abate a nuisance an entry may be made on the land on which the cause of the nuisance is, provided notice requesting removal of the nuisance be first given. But if

(*a*) *Baxter* v. *Taylor*, 4 B & Ad. 72.

(*b*) *Mumford* v. *Oxford, Worcester and Wolverhampton Rail Co*, 25 L. J. Ex. 265; *Simpson* v. *Savage*, 26 L. J. C. P. 50.

(*c*) *Kidgill* v. *Moor*, 9 C. B. 364.

(*d*) Stephens Commentaries, Bk. V., Chap. I. (15th ed., Vol. III., p. 284). It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

(*e*) *Per* BLACKBURN, J., in *Roberts* v. *Rose*, L. R. 1 Ex 82 [Ex. Ch.], at p. 89.

(*f*) *Ibid.*

nuisance can be abated without committing a trespass no notice is required (*a*).

(5) An entry on another's land to prevent an apprehended nuisance cannot be justified.

Notice.

It must be observed that notice is generally necessary before entry on the lands of another—but it seems that notice is dispensed with in three cases, viz., (*a*) where the owner of the land was the original wrongdoer, by placing the nuisance there ; (b) where the nuisance arises by default in performance of some duty cast on him by law ; and (c) when the nuisance is immediately dangerous to life or health (*b*).

Examples.

(1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may after notice and request to him to remove it, enter and pull it down (*c*) ; but whether the plaintiff had created scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*d*). But even after notice abatement cannot be justified in cases where an injunction would not be granted (*e*).

(2) Branches of trees overhanging a man's land may be cut to abate the nuisance without notice, provided this can be done without committing a trespass (*f*). But where a tree belonging to the defendant has been growing partly on his land and party on plaintiff's land for a number of years past, the plaintiff cannot cut off the overhanging branches or the penetrating roots of the tree. (*g*)

Pulling down inhabited house.

(3) A commoner may abate an encroachment on his common by pulling down a house or a fence obstructing his right (*h*) ; so also may one whose right of way is

(*a*) *Lemmon v. Webb*, [1895] A. C. 1.

(*b*) See *Jones* v. *Williams*, 11 M. & W. 176.

(*c*) *R.* v. *Rosewell*, 2 Salk. 459.

(*d*) *Norris* v. *Baker*, 1 Roll. Rep. 393, fol. 15.

(*e*) *Lane* v. *Capsey*, [1891] 3 Ch. 411.

(*f*) *Lemmon* v. *Webb*, [1895] A. C 1. ; *Hari Krishna* v. *Shankar Vithal*, 19 Bom. 420 ; *Behari Lal* v. *Ghisa Lal*, 24 All 499 ; *Luxmi Narayan Banerjee* v. *Tara Prasanna Banerjee*, 31 Cal. 944.

(*g*) *Someshwar Jethalal* v. *Chunilal Nageshwar*, 44 Bom. 605.

(*h*) *Mason* v. *Cæsar*, 2 Mod. Rep. 65.

Art. 105. obstructed (*a*); before pulling down a house, notice and request to remove must be given *if the house is actually inhabited* (*b*).

SECTION II.—NUISANCES TO INCORPOREAL HEREDITAMENTS.

Servitudes.

A servitude is a duty or service which is owned in respect of one piece of land, either to the owner as such of another piece of land, or to some other person. Property to which such a right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement.

Where the right is annexed to a dominant tenement it is said to be **appurtenant** if it arises by prescription or grant, and **appendant** if it arises by manorial custom. Where it is annexed merely to a person it is said to be a **right in gross.**

Natural servitudes.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state) and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription, or express or implied grant. The right to the employment of a conventional servitude is called an *easement* or a *profit a prendre in alieno solo*, according as the right is merely a right of user, or a right to enter another's land and take something from it, as game, fish, minerals, gravel, turf, or the like.

Easements and *profits a prendre.*

The easements known to our law are numerous. Mr. Gale, in his excellent treatise on Easements, gives a list of no less than twenty-five "amongst other" instances. Any unjustifiable interference with an easement or other servitude is a tort, and torts of this kind are usually classed with nuisances. As the rights interfered with are incorporeal hereditaments, they are spoken of as nuisances to incorporeal hereditaments. Torts of this kind are as various as are the kinds of easements and other servitudes, but in an elementary work such as this, it is only possible to treat of those which most often occur in practice, namely, inter-

(*a*) *Lane* v. *Capsey*, [1891] 3 Ch. 411.

(*b*) *Davies* v. *Williams*, 16 Q. B. 556; *Lane* v. *Capsey*, [1891] 3 Ch. 411.

ferences with : (1) rights of support for land, (2) rights of support for buildings, (3) rights to the free access of light and air, (4) rights to the use of water, and (5) rights of way. And as to these, it is only proposed to deal with the nature of the rights sufficiently to enable the student to appreciate what kind of acts amount to disturbances. The law relating to the acquisition of servitudes and their incidents belongs rather to the law of property than to that of torts. Art. 105.

Another kind of incorporeal right is a franchise, and a disturbance of that right is a nuisance. Franchises include rights of ferry and market. Other rights akin to franchises are patent rights, copyrights, and rights to trade markets ; the nature and acquisition of which depend largely upon the several statutes relating thereto. The right to vote for members of Parliament is also a franchise, and an action lies for preventing a person from exercising that right (*a*). Franchises.

Disturbances or interferences with *profits à prendre* (such as rights of common and fisheries) and of franchises (such as ferries and markets) are torts, and are properly included among nuisances to incorporeal hereditaments. But the nature of these rights and what acts amount in law to disturbances belongs rather to the law of property than to that of torts, and cannot be conveniently discussed in an elementary work on torts.

The law of easements in India is regulated by the Indian Easements Act (V. of 1882), and in such provinces where this Act is not in force by the provisions of the Indian Limitation Act (IX. of 1908) (*b*). The word "easement" has a wider signification in Indian law than in English law. The Indian Easements Act defines (*c*) an easement as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own," and explains the expression "to do something" as "including removal and appropriation by the dominant owner for the beneficial Indian law.

(*a*) *Ashby* v. *White*, 2 Lord Raym. 938 ; 1 Sm. L. C. 240.

(*b*) The present sections 26 and 27 of the Indian Limitation Act of 1908 correspond to ss. 26 and 27 of the Act XV. of 1877, and ss. 27 and 28 of Act IX. of 1871. The Indian Easements Act (s. 3) expressly repeals these provisions as to territories to which it applies.

(*c*) Section 4 of Act V. of 1882.

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enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon." The Limitation Act includes (*a*) in the term "easement," a right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another." It is clear, therefore, that the term "easement" is not used in India in its restricted sense, but includes real servitudes and *profits à prendre* alike (*b*). Though under the Limitation Act the term "easement" has been thought as including not only *profits à prendre* in gross, but likewise those appurtenant to land (*c*), yet the Indian Easements Act excludes rights in gross from the definition of easement" (*d*).

ART. 106.—*Disturbance of Right of Support for Land without Buildings.*

(1) Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support of mineral matter necessary to retain such neighbour's land in its natural and unencumbered state (*e*).

(2) A man may not pump from under his own land a bed of wet sand so as to deprive his neighbour's land of support (*f*); but he may

(*a*) Section 2, cl. 5, of Act IX. of 1908.

(*b*) *Dukhimullah v. Halway*, 23 Cal. 55; *Sundrabai* v. *Jayawant*, 23 Bom. 397; see also General Clauses Act (X. of 1897), s 3, cl. 25.

(*c*) *Chandi Charan Rai* v. *Shib Chandra Mandal*, 5 Cal. 945; 6 C. L. R 269; *Fadu Jhalla* v. *Gour Mohun Jhala*, 19 Cal. 544.

(*d*) *Municipal Board of Cawnpore* v. *Lallu*, 20 All. 200.

(*e*) *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Birmingham Corporation* v. *Allen*, 6 Ch. D. 284 [C. A.]; *Howley Park Coal and Cannel Co.* v. *London and North Western Rail. Co.*, [1913] A. C. 11; *Manley* v. *Burn*, [1916] 2 K. B. 121; *Dwarka Nath Gupta* v. *Corporation of Calcutta*, 18 Cal. 91.

(*f*) *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217 [C. A.].

pump water from under his own land with impunity, although the result may be to deprive his neighbour's land of support (*a*).

(3) In order to maintain an action for disturbance of this right, some appreciable subsidence must be shown (*b*), or, where an injunction is claimed, some irreparable damage must be threatened (*c*).

(4) The right of support may be destroyed by covenant, grant or reservation (*d*).

Indian Easements Act.

In India, the term "easement" includes "the right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person" (*e*). The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually caused (*f*).

Illustrations. The right arises *ex jure naturæ*.

(1) In *Humphries* v. *Brogden* (*g*), Lord CAMPBELL said: "The right to *lateral* support from adjoining soil is not, like the support of one building from another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other closes the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione* where there are separate freeholds from the surface of the land and the mines belong to different owners,

(*a*) *Popplewell* v. *Hodkinson*, L.R. 4 Ex. 248; but see *per* LINDLEY, M. R., in *Jordeson* v. *Sutton, etc Gas Co.*, [1899] 2 Ch., at p. 239.

(*b*) *Smith* v. *Thackerah*, L. R. 1 C. P. 564, as explained in *Att.-Gen. Conduit Colliery Co.*, [1895] 1 Q. B. 301 [C. A.], at p. 313.

(*c*) *Birmingham Corporation* v *Allen*, 6 Ch. D. 284 [C. A.]

(*d*) *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; *Aspden* v. *Seddon*, L. R. 10 Ch. App. 394, and cases there cited; *Davies* v. *Powell Duffryn Steam Coal Co.*, [1921] W. N. 161 [C. A.]

(*e*) Section 7, illus. (e).

(*f*) Section 34; *Dwarka Nath Gupta* v. *Corporation of Calcutta*, *supra*.

(*g*) 12 Q. B. 739.

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we are of opinion that the owner of the surface, while unencumbered by buildings *and in its natural state*, is entitled to have it supported by the subjacent mineral strata. Those strata may of course be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence.

Subterranean water.

(2) But although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there would seem to be nothing at common law to prevent him draining that soil, if for any reason it becomes necessary or convenient for him to do so. It has therefore been held that he is not liable if the result of his drainage operations is to cause a subsidence of his neighbour's land(*a*). But whatever may be true of percolating waters themselves, if a man withdraws, along with that water, quicksand or water-logged soil, and in consequence thereof his neighbour's land settles and cracks, he will be liable (*b*). And the same remark applies *a fortiori* to the withdrawal of pitch or other liquid mineral, and (it is submitted) to mineral oil (*c*).

Exception.

(3) Companies governed by the Railways Clauses Consolidation Act, 1845, by virtue of the mining sections (ss. 77–85), do not acquire a right to support in respect of mines within 40 yards of a railway, but as to all the mines outside that limit the common law right to lateral support for its railway is maintained unaffected (*d*).

(*a*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; but see the observations on this case made by LINDLEY, M. R., and RIGBY, L. J., in *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217 [C. A.], at pp. 239, 243.

(*b*) The subject was discussed in *Salt Union* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822. There the defendants were held not liable for pumping brine from under their land though the result was to remove the support of neighbouring land by dissolving the salt in the subsoil. The decision, however, turned on the special circumstances of the case and does not support the general principle that brine may be lawfully pumped so as to remove the support of adjacent lands.

(*c*) *Jordeson* v. *Sutton, etc. Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co.* v. *Ambard*, [1899] 2 Ch. 260, and [1899] A. C. 594 [P. C.]

(*d*) *Howley Park Coal and Cannel Co.* v. *London and North Western Rail. Co.*, [1913] A. C. 11 [H. L.].

ART. 107.—*Disturbance of Support of Buildings.*

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(1) A tort is *not* committed by one who so deals with his own property, as to take away the support necessary to uphold his neighbour's *buildings*, unless a right to such support has been gained by grant, express or implied (*a*), or by twenty years' uninterrupted user, peaceable, open, and without deception (*b*).

(2) But the owner of land may maintain an action for disturbance of the natural right to support for the surface notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury (*c*).

Where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption and for twenty years, the right to such support becomes absolute (*d*),

Indian Easements Act, s. 15.

(1) Thus, in *Partridge* v. *Scott* (*e*), it was said that "rights of this sort if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's, unless he has some grant to that effect." So, again, as between adjoining houses, there is no obligation towards a neighbour,

Right not *ex jure naturæ*.

(*a*) *Partridge* v. *Scott*, 3 M. & W. 220; *Brown* v. *Robins*, 4 H. & N. 186; *North Eastern Rail. Co.* v. *Elliott*, 29 L. J. Ch. 808.

(*b*) *Dalton* v. *Angus*, 6 App. Cas 740; *Shaik Yacoob* v. *Maung Ohn Ghine*, 8 Bur. L. R. 1.

(*c*) *Brown* v. *Robins*, 4 H. & N. 186; *Stroyan* v. *Knowles*, *Hamer* v. *Same*, 6 H. & N. 454.

(*d*) See *Ramakrishna Aiyar* v. *Sitaram Aiyar*, 37 Mad. 527.

(*e*) *Ubi-supra*. See *Anando Lal Das* v. *Baikantho Ram Rai*, 5 Cal. 283; *Shaik Yacoob* v. *Maung Ohn Ghine*, *supra*.

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cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*a*).

Right acquired by twenty years' user.

(2) But a grant of a right of support for buildings is gained by uninterrupted user for twenty years, if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the plaintiff's building (*b*).

(3) The right of support for an ancient building by adjacent buildings may be acquired by prescription in the same way as may the right of support by adjacent lands (*c*).

Where natural right to support of site infringed, the consequent damage to a modern house may be recoverable.

(4) Though no right of support for a building has been gained, yet if the act of the defendant would have caused the site of the building to subside without the building, the defendant will be liable, not merely for the damage done to the land, but also for the injury caused to the building. For he will have committed a wrongful act (*viz.*, an act causing the subsidence of his neighbour's land), and will consequently be liable for all damages which might reasonably have been anticipated as the consequence of that act (*d*).

ART. 108.—*Disturbance of Right to Light and Air.*

(1) There is no right, *ex jure naturæ*, to the free passage of light to a house or building, but such a right may be acquired by (a) express or implied grant from the contiguous proprietors; (b) by reservation (express or implied) on the sale of the servient tenement; or (c) by actual enjoy-

(*a*) *Chauntler* v. *Robinson*, 4 Ex 163.

(*b*) *Dalton* v. *Angus*, 6 App. Cas. 740.

(*c*) *Lemaitre* v. *Davis*, 19 Ch. D. 281.

(*d*) *Stroyan* v. *Knowles*, *Hamer* v. *Same*, 6 H. & N. 454. For an example of a proper case for an injunction to prevent such damage, see *Consett Industrial, etc. Society, Limited* v. *Consett Iron Co., Limited*, [1921] W. N. 161.

ment of the such light for the full period of twenty years without interruption submitted to or acquiesced in for one year after the owner of the dominant tenement shall have had notice thereof, and of the person making or authorising such interruption (*a*). Art. 108.

(2) A right to the free access of air through a particular defined channel, or through a particular aperture, may be acquired (*b*) in the same way as a right to light. But a right to the free access of air over land to land or buildings at large cannot (it seems) be acquired (*c*).

(3) Where the owner of a house has acquired a right over land to light in respect of any windows in that house, any person who builds on that land so close to those windows as to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) as to render it impossible to carry on business therein as beneficially as before, commits a tort (*d*).

Indian law.

In England, rights to light are acquired under the Prescription Act, but rights to air are acquired under the common law. The statute law of India places rights of light and air on the time footing, and allows similar acquisition by prescription (*e*).

Illustrations.

Implied grants of right.

(1) Implied grants of easements are generally founded on the maxim, "A man cannot derogate from his own grant." In other words, the grantor of land which is to

(*a*) 2 & 3 Will. 4, c. 71, ss. 3, 4.

(*b*) *Bass* v. *Gregory*, 25 Q. B. D. 481; *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*c*) *Webb* v. *Bird*, 13 C. B. (N.S.) 841; *Bryant* v. *Lefever*, 4 C. P. D 172 [C. A.]; *Chastey* v. *Ackland*, [1895] 2 Ch. 389 [C. A.]; see *S. C.*, [1897] A C. 155.

(*d*) *Colls* v. *Home and Colonial Stores, Limited*, [1904] A. C. 179

(*e*) Indian Easements Act, s. 15; Indian Limitation Act of 1908, s. 26; see *Delhi and London Bank, Limited* v. *Hem Lall Dutt*, 14 Cal. 839; *Sarubai* v. *Bapu*, 2 Bom. 660.

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be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made (*a*).

Right gained by prescription.

(2) To gain a right by prescription under s. 3 of the Prescription Act, 1832 (*b*), there must be user without the written consent (*c*) of the owner of the servient tenement, uninterrupted for twenty years, from the time when window spaces are complete and the building is roofed in (*d*). As, however, by s. 4, nothing is to be deemed an interruption unless submitted to for a year after notice, it has been held that enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before the action was commenced, was sufficient to establish the right (*e*). However, for the purposes of commencing an action an inchoate title of nineteen years and a fraction is not sufficient, and no injunction will be granted until the twenty years have expired (*f*).

In India, where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement without interruption and for twenty years, the right to such access and use of light or air becomes absolute, and nothing is an interruption, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant had notice thereof, and of the person making or authorising the same to be made (*g*).

(*a*) *Aldin* v. *Latimer Clark, Muirhead & Co*, [1894] 2 Ch 437.

(*b*) 2 & 3 Will. 4, c. 71.

(*c*) Verbal consent is not enough to prevent acquisition of the right; *Mallam* v *Rose*, [1915] 2 Ch. 222.

(*d*) *Collis* v. *Laugher*, [1894] 3 Ch. 659; and the section does not apply to doorways; *Levet* v. *Gaslight and Coke Co.*, [1919] 1 Ch. 24.

(*e*) *Flight* v. *Thomas*, 11 A. & E 688 [Ex. Ch.].

(*f*) *Lord Battersea* v *City of London Commissioners of Sewers*, [1895] 2 Ch. 708; *Elliot* v. *Bhuban Mohun Banerjee*, 12 B. L. R. 406.

(*g*) Indian Easements Act, s. 15. The provisions of the Limitation Act are similar, except that s. 26 requires that the access and use of light and air must have been enjoyed "as of right," *i.e*, in the assertion of a right; *Hira Lal Koer* v. *Paramessur Koer*, 15 W. R. 401. See *Hari* v. *Mahadeo*, 61 I. C. 569.

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The English law requires the knowledge and the acquiescence of the servient owner to create a right by prescription, but the Indian legislature has not laid down this rule and, consequently, ignorance of the servient owner would not be a bar under the Indian Acts (*a*).

Right to access of air

(3) Actions to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on, as a right to the access of "light and air." Most of the cases relate solely to the interference with the access of light, and it has been said that a right to the access of air over the general unlimited surface of the land of a neighbour cannot be acquired by mere enjoyment (*b*). Thus, in *Webb* v. *Bird* (*c*), it was held that the owner of an ancient windmill could not, under the Prescription Act, prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill. A similar decision was given in *Bryant* v. *Lefever* (*d*), where it was sought to restrain the defendant from building so as to obstruct the access of air to the plaintiff's chimneys. But there seems really to be no difference in principle between easement of light and of air (*e*), and a right to the uninterrupted passage of air **through a defined aperture,** such as a window used for ventilation (*f*), or a ventilating shaft (*g*), may be acquired by grant or prescription.

The Indian Easements Act says that a right to a free passage of light or air to an open space of ground cannot be acquired by prescription (*h*). A right to enjoy a flow of south breeze without obstruction may be acquired by express

(*a*) *Arzan* v. *Rakal Chundar*, 10 Cal. 216 (but see *Bhuban Mohun Banerjee* v. *Elliot*, 6 B. L. R. 85, where the cause of action arose in the town of Calcutta, and so the English law was applied).

(*b*) *Per* COTTON, L. J., *Bryant* v. *Lefever*, 4 C. P. D. 172 [C. A.]. See also *Chastey* v. *Ackland*, [1895] 2 Ch. 389 [C. A.]; [1897] A. C. 155.

(*c*) 13 C. B. (N. S.) 841.

(*d*) *Supra* See *Hardswall Lalumal* v. *Kundabai*, 7 S. L. R. 21; 20 I. C. 544

(*e*) *Thadomal Begrai* v. *Jesumal Beharimal*, 6 S. L. R. 255; 19 I. C. 843.

(*f*) *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*g*) *Bass v. Gregory*, 25 Q. B. D. 481.

(*h*) Section 17 (b).

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Degree of diminution giving rise to an action.

grant, but not by presumption arising from user, whether the presumption is one of prescription or not (*a*).

(4) Where a right to light has been acquired by express grant, the question whether any substantial infringement of the right has taken place must depend upon the construction of the grant. But where a right has been acquired by *implied grant* or under the Prescription Act, the owner of the right is entitled to prevent any person from building so close to the window in respect of which the light is acquired as to render the occupation of the house in which the window is situated uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the owner from carrying on business as beneficially as before (*b*). The sole question to be determined in deciding whether a right to light has been so far infringed as to give rise to an action is whether the obstruction is so great as to amount to a nuisance (*c*). It follows, therefore, that the use of an extraordinary amount of light for twenty years will not give rise to a right to receive that amount of light always, because the question whether an obstruction of light is so great as to be a nuisance cannot be affected by any considerations of what the light has been used for (*d*). Very generally speaking an obstruction of the light which flows to a window will not be considered a nuisance if the light which remains can still flow to the window at an angle of forty-five degrees with the horizontal, specially if there is good light from other directions as well (*e*).

In provinces to which the Indian Easements Act has not been extended, the aforesaid principles of English law have been followed. In *Bagram* v. *Khettranath Karformah* it was said, "Principles of general convenience upon which the presumption of right to light by prescription or grant depend, require that lights in a dwelling-house, which have been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for habitation,

(*a*) *Bagram* v. *Khettranath Karformah*, 3 B. L. R. (O C J.) 18 *Delhi London Bank, Limited* v. *Hem Lal Dutt*, 14 Cal. 859; *Sarojini Debi* v. *Krishna Lal*, 36 C. L. J. 406 (following *Webb* v. *Bird*, 13 C. B N. S. 841).

(*b*) *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.

(*c*) *Ibid*, *per* Lord DAVEY, at p 204; *Semon (Charles) & Co., Ld.* v. *Bradford Corporation*, [1922] 2 Ch. 737.

(*d*) *Ambler* v. *Gordon*, [1905] 1 K. B 417.

(*e*) *Per* Lord LINDLEY *in Colls* v. *Home and Colonial Stores*, [1904] A. C., at p. 210; and see *Kine* v. *Jolly*, [1905] 1 Ch. 480 [C. A].

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but they do not require such a presumption as would impede the erection of buildings on the servient tenement, which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation. . . . To give a right of action (in a case where there is no express contract on the subject) for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house ; in other words, to render the house unfit for the ordinary purposes of habitation and business" (*a*).

The "45-degree rule" is not a positive rule of law, but is a circumstance which the court may take into consideration and is especially valuable when the proof of obscuration is not definite or satisfactory (*b*).

The Indian Easements Act does not follow the English rules, but says that the extent of the prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period, irrespectively of the purposes for which it has been used (*c*).

An action for compensation for disturbance of the easements of light and air will lie in the event of substantial damage. Damage is substantial if it interfere materially with the physical comfort of the plaintiff, or prevent him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit; and in the case of disturbance of easement

(*a*) 3 B. L R. (O C. J) 18 ; *Mothoosudan* v. *Bissonath*, 15 B. L. R. 361 ; *Delhi and London Bank* v. *Hem Lal Dutt*, 14 Cal. 839 ; *John Alexander Anderson* v. *Hardut Roy Chamaria*, 9 C. W. N. 543 ; *Haji Ahmed Moola Dawood* v. *Poker Mul*, 5 Bur. L. T. 116 ; 15 I. C 945 ; *Balthazar & Sons* v. *Patail*, 11 Bur. L. T. 109 ; 49 I. C. 458 ; *Peter Charles Earnest Paul* v. *William Roboon*, 42 Cal. 46 ; 41 I. A. 180.

(*b*) *Delhi and London Bank* v. *Hem Lal Dutt*, *supra* ; *Bala* v. *Maharu*, 20 Bom. 788.

(*c*) Section 28 (c) ; *Kunni Lal* v. *Kundan Bibi*, 4 A. L. J 477 ; *Chotalal Mohunlal* v *Lallubai Sur Chand*, 29 Bom. 157 ; *Framji Shapurji* v *Framji Edulji*, 30 Bom. 319 ; *Esa Abbas Sait* v. *Jacob Harron Sait*, 20 M L. J. 291 ; 7 M. L. T. 345 ; 4 I. C. 475 ; *Ramanjulu Naidu* v. *Apparanji annual*, 21 M. L. J. 313 9 I C. 417. See *Calcraft* v. *Thompson*, 15 W. R. 387.

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of air, if it interfere materially with the physical comfort of the plaintiff, though it is not injurious to his health (*a*).

Right of prospect.

No action lies for the obstruction of a mere view or prospect. "That for stopping as well of the wholesome air as of light, an action lies, and damages can be recovered from them, *for both are necessary* . . . but that of prospect, which is a matter only of delight, and not of necessity, no action lies for the stopping thereof, and yet it is a great commendation for a house if it has a long and large prospect . . . But the law does not give you an action for such things of delight" (*b*).

Right of privacy.

The law of England does not recognise a right to undisturbed privacy (*c*). The Indian Easements Act classes it under customary easements, and allows it to be acquired by local custom (*d*).

(*a*) Section 33.

(*b*) *Per* WRAY, C.J., in *Aldred's Case*, 9 Coke's Rep. 58; *Att.-Gen.* v. *Doughty*, 2 Ves. Sen. 453; *Bagram* v *Khettranath Kurformah*, *supra*; *Kurusu Kostha* v *Thommai Savarimuthu*, 20 M. L. J 367; 6 I. C 780.

(*c* *Jones* v. *Tapling*, 12 C B. (N S.) 826; *Turner* v. *Spooner*, 30 L. J Ch. 801.

(*d*) Section 18, illus. (b) This right has been recognised in Bombay, Allahabad, and the Punjab (*Manishanker* v *Trikam Narsi*, 5 B. H. C. R 42; *Kuvurji Premchand* v *Bai Javer*, 6 B. H C. R 143; *Lajja Ram* v *Faqira*, [1915] P. L. R. 74; 29 I C 154; *Mulia Bhama* v. *Sundar Dana*, 38 Bom. 1; *Maneklal Motilal* v. *Moganlal Narottamdas*, 44 Bom 496; *Nathubhai* v. *Chaganlal*, 2 Bom. L. R. 454 (limited to particular apartments secluded from observation); *Shrinivas* v. *Magistrate of Dharwar*, 9 B H. C R. 266 (not prevalent in Dharwar); *Shah Mahomed* v. *Ramjan*, 66 I. C. 883 available for roofs of houses in Sindh); *Lachman* v. *Jamna Prasad*, 10 All. 162; *Gokal Prasad* v. *Radho*, 10 All. 358; *Abdul Rahman* v. *Emib*, 16 All. 69 (does not depend on religion); *Abdul Rahman* v *Bhagwan Das*, 29 All. 382; *Sheonath* v. *Ali Hussain*, 1 A. L. J 118; *Nanuk Chand* v. *Lalla*, 21 P. R. 1869; *Gohree* v *Jaintee*, 91 P. R 1869; *Shibdyal* v *Golab*, 96 P. R 1876; *Yasin* v. *Gokal Chand*, 19 P. R. 1882; also *Mohammad Shabbir* v. *Mohammad Jawad*, 15 I. C. 270; but not in Calcutta and Madras; *Srinath Datta* v. *Nand Kishore Basu*, 5 W. R 208; *Ramlal* v *Mohesh Basu*, 5 B. L. R. 677; *Ghulam Ali* v *Mahomed Zahar*, 6 B. L R. 76; *Komathi* v *Gurunatha*, 3 M. H. C R. 141; *Sayyad Azuf* v *Ameerubibi*, 18 Mad 163; *Sarojini Debi* v. *Krishna Lal*, 36 C. L. J. 406.

ART. 109.—*Disturbance of Water Rights.* Art. 109.

(1) Every owner of land on the banks of a natural stream has a right *ex jure naturæ* to the ordinary use of the water which flows past his land (*e.g.*, for irrigation, feeding cattle, domestic purposes, etc.) (*a*). Such an owner may also make use of the water for other purposes than ordinary ones, provided that, in so doing, he does not interfere with the similar rights of other riparian owners lower down the stream (*b*).

(2) An artificial watercourse may have been originally made under such circumstances, and have been so used, as to give to the owners on each side all the rights which a riparian proprietor would have had if it had been a natural stream (*c*).

(3) There is, however, no right to the continued flow of water which runs through natural underground channels, which are undefined or unknown, and can only be ascertained by excavation (*d*).

(4) No one has a right to pollute the water percolating under his own land and flowing

(*a*) In India the use of water for irrigation purposes has been held to be not primary and natural but only secondary, and extraordinary or artificial, so only a reasonable proportion of the water can be used for the such purposes ; *Belbhadar* v. *Sheik Barkat Ali*, 11 C W. N. 85. See also *Fitcher* v. *Secretary of State for India*, 32 Mad 161; *Harichand* v. *Kanchan Mahto*, 52 I. C. 276 ; *Mahabir Sahu* v *Ram Saran Sahu*, 51 I. C. 949.

(*b*) *Miner* v. *Gilmour*, 12 Moo P. C. C. 131; *Embrey* v *Owen*, 6 Ex. 353; *Baldeo Singh* v. *Jugal Kishore*, 33 All 6.9.

(*c*) *Baily & Co.* v. *Clark, Son and Morland*, [1902] 1 Ch. 649 [C. A.] ; *Whitmore's (Edenbridge), Limited* v. *Stanford*, [1909] 1 Ch. 427.

(*d*, *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655.

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thence by underground channels into another land so as to poison the water which that other has a right to use (*a*).

The law in regard to riparian owners is the same in India as in England, and is stated in illustration (h) of s. 7 of the Indian Easements Act (*b*).

Illustrations.

Rights of riparian owners.

(1) Every riparian owner may reasonably use the stream for drinking, watering his cattle, or turning his mill, and other purposes connected with his tenement, provided he does not thereby seriously diminish the stream (*c*). But he has no right to divert the water to a place outside his tenement, and there consume it for purposes unconnected with the tenement (*d*), even though he does not thereby diminish the flow of water to a lower riparian tenement (*e*).

(2) The right to water flowing to a man's land through an artificial water-course, constructed on a neighbour's land, must, unlike the natural right to that flowing in a natural channel, rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. Such a right may be presumed from the time, manner, and circumstances of the enjoyment of the easement (*f*).

But an upper riparian owner is entitled to drain water, provided the amount diverted does not exceed the amount which he has himself by artificial means put into the stream (*g*).

(*a*) *Ballard* v. *Tomlinson*, 29 Ch. D. 115 [C. A.].

(*b*) *Narayan* v. *Keshav*, 23 Bom. 506.

(*c*) *Embrey* v *Owen*, 6 Ex 353; *White (John) & Sons* v. *White (J and M.)*, [1906] A. C 72; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil*, 7 Bom 209; *Debi Prasad Singh* v. *Joynath Singh*, 24 Cal. 865; 24 I. A. 60; *Narayan* v. *Keshav*, *supra*; *Perumal* v. *Ramasami*, 11 Mad 16; *Athurali* v *Secunder*, 4 W. R. 28; *Sardowan* v. *Hurbuns*, 11 W. R. 254; *Dinkar* v. *Narayan*, 29 Bom. 357; *Sheo Narayan Singh* v. *Chandra Bhal*, 10 I. C. 181; also *Tha* v. *Lan Ma Gale*, 3 L. B. R 23.

(*d*) *McCartney* v. *Londonderry and Lough Swilly Rail. Co*, [1904] A. C. 304; *Aiyavu Moopan* v. *Swaminatha*, 28 Mad. 288.

(*e*) *Aiyavu Moopan* v. *Swaminatha*, *supra*.

(*f*) *Romeswar Persad* v *Koonj Behari*, 4 Cal. 633; 6 I. A. 33.

(*g*) *Fischer* v. *Secretary of State for India*, 32 Mad. 141.

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Disturbance of riparian rights.

(3) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrong-doer for violation of the right, event though he may not be able to prove that he has suffered any actual loss (*a*). So if one erects a weir which affects the flow of water to riparian owners lower down the river, an injunction will be granted (*b*).

(4) There is no right to dam back or exhaust the water to the prejudice of the rights of lower riparian owners in the absence of special custom to sanction it (*c*).

(5) But where a riparian owner takes water from a river, and after using it for cooling certain apparatus returns it undiminished in quantity and unpolluted in quality, a lower riparian owner has no right of action. For his only right is to have the water abundant and undefiled, and that right is not infringed (*d*).

Abstracting underground water.

(6) The owner of land containing underground water, which percolates by undefined channels, or by defined but unascertained channels, and flows to the land of a neighbour, has the right to divert or appropriate the water within his own land so as to deprive his neighbour of it (*e*). The same

(*a*) *Wood* v. *Wauder*, 3 Ex. 748; *Embrey* v. *Owen*, 6 Ex. 353; *Crossley* v. *Lightowler*, L. R. 2 Ch 478; *Shunkar* v. *Gurbhoo*, 15 W. R. 216.

(*b*) *Belfast Ropeworks* v. *Boyd*, 21 L. R. Ir. 560 [C. A.].

(*c*) *Narayan* v. *Keshav*, 23 Bom. 506; *Belbhadar Pershad Singh* v. *Sheik Barkat Ali*, 4 C. L. J. 370; 11 C. W N. 85; *Mahadu Rama* v. *Narayan Yesh Shet*, 6 Bom. L. R. 291; *Rangappa Naicker* v. *Appalaraja*, 33 I. C. 503, *Secretary of State* v. *Palaniappa*, 6 L. W. 572; 41 I. C 24; *Secretary of State* v. *Ambalavana Pandarasannadhy*, 37 Mad 369; *Krishna Dayal* v. *Bhawani Koer*, 3 Pat. L. W. 5; *Heeranund* v. *Khubeerunissa*, 15 W. R. 576; *Chumroo Singh* v. *Mullick Khyrut*, 18 W. R. 525; *Ran Bahadur* v. *Pudhi Rai* (1864), W. R. 319.

(*d*) *Kensit* v. *Great Eastern Rail. Co.*, 27 Ch. D. 122 [C. A.]. In that case the water was abstracted by a non-riparian owner under a license from a riparian owner. The license however, could not confer any right, as a riparian owner clearly cannot confer on others such rights as he has as riparian owner. But, as the action failed against the non-riparian owner, *a fortiori* it would against a riparian owner taking away water and returning it undiminished and unpolluted. See *Wazira* v. *Sipadar Khan*, 33 P. R 1867.

(*e*) *Chasemore* v. *Richards*, 7 H. L. Cas. 749; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655; *Bradford Corporation* v. *Pickles*, [1895] A. C. 587.

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rule applies to common surface water rising out of springy or boggy ground and flowing in no defined channel (*a*).

(7) So a prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream though it might ultimately, if not arrested, flow into a tank (*b*).

(8) Under the Indian Easements Act, a right to surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise, and a right to underground water not passing in a defined channel, cannot be acquired by prescription (*c*).

Fouling underground water.

(9) But although there can be no *property* in water running through underground undefined channels, yet no one is entitled to pollute water flowing beneath another's land. Thus, in *Ballard* v. *Tomlinson* (*d*), where neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by the Court of Appeal that an action lay; for there is a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other. The one merely deprives a man of something in which he has no property, the other causes an active nuisance.

Exception. Prescriptive rights.

Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*e*).

(*a*) *Rawstron* v. *Taylor*, 11 Ex. 369; *D. Gangatharadu* v *D. Narasammah*, 7 M. H. C. R. 37; *Bansi Sahu* v. *Kali Prasad*, 13 W. R 414; *Adinarayana* v. *Ramudu*, 37 Mad 304; *Munshi Misser* v. *Bhimrajman*, 40 Cal 458 F. B; *Janardan Ganesh* v. *Ravji Bhikaji*, 42 Bom. 288.

(*b*) *Maharajah of Venkatagiri* v *Secretary of State*, 28 M. L J. 98; 26 I. C. 800; *D. Gangatharadu* v. *D. Narasammah*, *supra*.

(*c*) Section 17 (c) and (d).

(*d*) 29 Ch D 115.

(*e*) See *Mason* v *Hill*, 3 B & Ad. 304; *Carlyon* v *Lovering*, 1 H. & N. 784; *Badan Thakur* v. *Shankar Das*, W. R. (1864) 106.

AR. 110.—*Disturbance of Private Rights of Way.*

Art. 110.

(1) A right of way over the land of another can only arise by grant, express or implied, by immemorial custom or necessity (*a*), or by prescription (*b*).

(2) A person commits a tort who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily or by otherwise preventing its free user.

Right restricted by the terms of the grant or the extent of the user.

We are here dealing with private rights of way, as distinguished from public rights of way. A public way or highway is a right enjoyed by the public to pass over land. A private right of way is a right one person may enjoy by grant or prescription to pass over another's land, or which an owner of land may have by grant or prescription for himself, his tenants and servants to pass over the lands of another.

There may also by custom be a way which can only be lawfully used by the inhabitant of a parish for going to and from the parish church (*c*)

The following rights of way have been recognised by Indian courts; for worshippers (*d*), foot-passengers (*e*),

(*a*) *Charu Surnokar* v. *Dokauri Chandar*, 8 Cal. 956; *Haro* v. *Rama Chandra*, 5 Bom. L R. 650; *Municipality of Poona* v. *Vaman*, 19 Bom. 797; *Bhugwân* v. *Kosal*, 7 W. R. 271; *Omar Shah* v. *Rumsan*, 10 W. R. 363.

(*b*) *Savalgiappa* v. *Basvanappa*, 10 B H. C. R. 399; *Eopu* v. *Bhoobun*, 23 W. R. 401; *Mohim Chunder* v. *Chundee*, 10 W. R. 452; *Joy Durga* v. *Juggernath*, 15 W. R. 295; *Hura Lal* v. *Paramessur*, 15 W. R. 401; *Rambhai Dabai* v. *Vallabbhai Jhaverbhai*, 45 Bom. 1027; *Fatteh Mahomed* v. *Amir Debi*, 2 Lah. L. J. 499.

(*c*) See *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.

(*d*) *Sheikh Mangree Mian* v. *Behari Lal*, 6 Pat. L J. 11; 61 I. C. 132.

(*e*) *Goluk Chandra Chaudri* v *Tarini Charan Chakravarti*, 4 W. R. 49; *Hameed Hussain* v. *Gervain*, 15 W. R. 496; *Tulsi Mani Debi* v. *Jogesh Chundra Saha*, 1 C. L. R. 425; *Arzan* v. *Rakhal Chandra*, 10 Cal. 214; *Wutzler* v *Sharpe*, 15 All. 270; *Ranchordas*, v. *Manicklal*, 17 Bom. 648; *Municipality of the City of Poona* v. *Vaman*, 19 Bom. 797; *Naran* v. *Lallu Bhai*, 2 Bom. L. R. 116.

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for sweepers (*a*), for cattle (*b*), for passage of boats (*c*), for carriage (*d*), for general purpose (*e*), and in particular seasons of the year (*f*).

Obstruction of rights of way.

It does not require a permanent obstruction to give rise to a right of action. Thus padlocking a gate (*g*), or permitting carts or wagons to remain stationary on the road in the course of loading and unloading, in such a way as to obstruct the passage over the road, will give rise to an action(*h*).

(*a*) *Jadulal Mullick* v. *Gopal Chandra Mukherji*, 9 Cal. 778; 13 Cal. 136; 13 I A. 7; *Esubai* v. *Damodar*, 16 Bom. 552 (in this case the application of the rule in *Bolton* v. *Bolton*, 11 Ch. D. 971, to India was doubted); *Yosef David Varulekar* v. *Moses Solomon*, 24 Bom. L. R 298; *Kunjammal* v. *Rathnam Pillai*, 45 Mad. 633.

(*b*) *Jai Durga Dasi* v *Jagannath Rai*, 15 W. R. 295; *Mahamed Unsar* v. *Sefatullah*, 22 W. R. 340 See *Lal Bahadur* v. *Rameshar Dayal*, 43 All. 345.

(*c*) *Lokanath* v *Monmohun*, 20 W. R. 293; *Kailash Chundra* v. *Sonatun Chang Barui*, 7 Cal. 132; *Durga Charan Dhar* v. *Kali Kumar Sen*, 7 Cal. 145.

(*d*) *Ranchordas* v. *Manicklal*, 17 Bom. 648.

(*e*) *Raj Manick Singh* v. *Rattan Manik Basu*, 15 W. R 46; *Imam Bandi* v. *Sheo Dyal*, 14 W. R. 199

(*f*) *Ram Sundar Baral* v. *Umakant Chakravarti*, 1 W. R. 277; *Omar Shah* v. *Ramzanali*, 10 W. R. 363; *Kailash Chandra* v. *Sonatan*, 7 Cal. 132.

(*g*) *Kidgill* v. *Moor*, 9 C. B. 364. See also *Geohegan* v. *Henry*, 55 I. L. T. 190 [C. A.].

(*h*) *Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650.

CHAPTER XII.

TRESPASS TO THE PERSON.

Introductory.

In the case of most of the torts which we have hitherto considered, there was a wrongful act distinct from the damage to the plaintiff, and which would, if it had not been followed by damage, have given no right of action. But in the case of trespass to the person, and of trespass to land and goods, the wrongful act and the damage resulting from it are practically indivisible. These are what are spoken of in many text books as *injuriæ*. They require no proof of damage resulting from the wrongful act. The mere fact that a private right has been infringed **without lawful excuse,** constitutes of itself both wrongful act and damage, and gives the party affronted a right of action, even although his actual surroundings may have been improved rather than depreciated.

Trespass consists in (a) infringements of the right of safety and freedom of the person (trespass to the person); (b) infringements of rights of real property (trespass to land); and (c) infringements of rights to goods (trespass to goods).

ART. 111.—*General Liability for Trespass to the Person.*

(1) Trespass to the person may be by assault, battery, or false imprisonment.

(2) Any person who commits a trespass to the person whether by assault, battery, or imprisonment without lawful justification commits a tort.

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Ancient classification.

The older writers speak of six kinds of trespasses to the person: threats, assault, battery, wounding, mayhem (or maiming) and false imprisonment. But at the present time it is sufficient to distinguish the three groups above mentioned.

Onus of proof.

Primâ facie every hostile interference with the person or liberty of another is wrongful without proof of damage; but as we shall see, acts which are primâ facie trespasses may often be justified. The burden of proof of justification always lies on the defendant. The plaintiff need only prove that without his consent the defendant committed an act which would primâ facie amount to a trespass to the person, and it is for defendant to justify if he can.

ART. 112.—*Definition of Assault.*

An assault is an attempt or offer to apply force to the person of another directly or indirectly if the person making the attempt or offer causes the other to believe on reasonable grounds that he has the present ability to execute his purpose (*a*).

Attempt.

(1) Thus, if one make an attempt, and have at the time of making such attempt a present primâ facie ability to do harm to the person of another, although no harm be actually done, it is nevertheless an assault. For example, menacing with a stick a person within reach thereof although no blow be struck (*b*); or striking at a person who wards off the blow with his umbrella or walking-stick, or throwing a bottle into a house with intent to frighten the inmates (*c*); or pursuing with a shoe in hand with threats to beat (*d*), would constitute assaults.

(*a*) See I. P. Code, 1860, s. 351 and the Criminal Code, (Indictable Offences) Bill, 1879, s 3.

(*b*) *Read* v. *Coker*, 13 C B. 850.

(*c*) *R* v *Po Taw*, 3 L B R. 194.

(*d*) *Gobind* v. *Pandurang*, 36 Bom. 443.

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(2) But a mere verbal threat is no assault; nor is a threat consisting not of words but gesture, **unless there be a present ability to carry it out.** This was illustrated by POLLOCK, C, B., in *Cobbett* v. *Grey* (*a*). "If," said the learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (*b*), 'I will commit an assault,' I think that is not an assault." Threat.

(3) To constitute an assault there must be an *attempt*. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*c*).

(4) For the same reason, shaking a stick in sport at another is not actionable (*d*).

ART. 113.—*Definition of Battery.*

(1) Battery consists in touching another's person hostilely or against his will, however slightly (*e*).

(2) If the violence be so severe as to wound, and *a fortiori* if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight), the damages will be greater than those awarded for a mere battery; but otherwise the same rules of law apply to these injuries as to ordinary batteries.

(1) This touching may be occasioned by a missile or any instrument set in motion by the defendant, as by throwing water over the plaintiff (*f*), or spitting in his face, or causing Illustrations.

(*a*) 4 Exch. 729, at p. 744. (*b*) *Query*—Battery.

(*c*) *Tuberville* v *Savage*, 1 Mod. Rep. 3. See also *R.* v. *Birbal Kalifa*, 30 Cal. 97.

(*d*) *Christopherson* v *Blare*, 11 Q. B 473, at p 477.

(*e*) *Rawlings* v. *Till*, 3 M. & W. 28.

(*f*) *Pursell* v. *Horn*, 8 A. & E. 602.

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another to be medically examined against his or her will (*a*). In accordance with the rule, a battery must be involuntary: therefore a beating voluntarily suffered is not actionable: for *volenti non fit injuria* (*b*).

Friendly touching.

(2) Merely touching a person in a friendly way in order to engage his attention is no battery (*c*).

Pure accident.

(3) An entirely unintentional touching, which is the result of pure accident, does not amount to trespass. Where one of a shooting party fired at a pleasant and a shot from his gun glanced off a tree and accidentally wounded the plaintiff, a carrier, it was held that there was no trespass (*d*). But whenever an injury to the person is the result of an act of direct force, it amounts to trespass to the person if it is wrongful, either as being **wilful** or as being **the result of negligence** (*e*).

Accident in course of doing unlawful act

(4) But a touch unintentional and without negligence is an assault if it be done **in the course of doing an unlawful act** (*f*). Thus, where a tramway company was authorised by statute to run a steam tramcar on a public road, the statute must be taken to impose on the company a duty to see that the cars and tramway, and all necessary apparatus, are kept in proper condition for this purpose. If they fail to do so, and the tramway be in an improper condition, then, in running their cars on that tramway, they are doing **that which they are not authorised to do by their Act.** They are only authorised to be on the highway at all by their Act; and as regards the public, they can only justify using the tramway, if they are doing what the Act allows them to do. If therefore (apart from any question of negligence), a car runs on the defective tramway, and injures a passer-by, the company will be liable; for it is a direct injury to the person done in the course of doing an unlawful act, and without justification or excuse (*g*).

(*a*) *Latter* v. *Braddell and Sutcliffe*, 29 W. R 239.

(*b*) *Christoperson* v *Bare*, 11 Q. B 473.

(*c*) *Coward* v. *Baddeley*, 28 L J. Ex. 260.

(*d*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

(*e*) *Per* BRAMWELL, B., in *Holmes* v. *Mather*, L. R. 10 Ex. 261.

(*f*) *Sadler* v *South Staffordshire and Birmingham District Steam Tramways Co.*, 23 Q. B. D. 17 [C. A.].

(*g*) *Ibid.*

ART. 114.—*Definition of False Imprisonment.* Art. 114.

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification (*a*). The restraint may be either physical or by a mere show of authority.

Moral restraint.

Imprisonment does not necessarily imply incarceration, but any restraint by force or show of authority. For instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*b*). So, too, it is imprisonment if one is restrained in his own house from leaving a room and going upstairs (*c*). But some total restraint there *must* be, for a partial restraint of locomotion in a particular direction (as by preventing the plaintiff from exercising his right of way over a bridge) is no imprisonment; for no restraint is thereby put upon his liberty (*d*).

Actual restraint for however short a time constitutes imprisonment—as when a prisoner who has been acquitted was taken down to the cells and detained for a few minutes whilst questions were put to him by the warders (*e*).

The retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will,—as when a person accused of an offence for which he was not answerable without warrant was directed to present himself before a magistrate in the company of two constables so as to prevent him from speaking to any one on the way (*f*).

(*a*) *Bird* v. *Jones*, 7 Q. B. 742. See *Paton* v. *Honiran*, 3 Agra H. C. 409.

(*b*) *Warner* v. *Riddiford*, 4 C. B. (N.S.) 180.

(*c*) *Grainger* v. *Hill*, 4 Bing. N. C. 212; see *Harvey* v. *Mayne*, 6 Ir. C. L. R 417; *Rajah Pedda Venkatappa* v *Aroovala*, 2 M. I. A. 504; *Madhub Chunder* v. *Banee Madhub*, 15 W. R. 85.

(*d*) *Bird* v. *Jones*, *supra*; *Mahamad Usufuddin* v. *Secretary of State*, 30 Cal. 872.

(*e*) *Mee* v. *Cruikshank*, 86 L. T. 708.

(*f*) *Parankusam Narasayyu Pantulu* v. *Captain R A. C. Smart*, 2 M. H. C. R. 396.

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The distinction between false imprisonment and malicious prosecution is that the former unjustifiably restrains the liberty of the person, the latter is the malicious institution against another of bankruptcy or criminal proceedings without reasonable cause and may frequently be the actual precursor of false imprisonment. Malicious prosecution sets in motion *judicial* process. False imprisonment sets in motion *executive* process.

(1) So if I lay an information before a justice, upon which he issues his warrant for the arrest of the alleged offender, it is his arrest and not mine. Though I may be liable in an action for malicious prosecution I cannot be liable in an action for false imprisonment.

(2) But if, without the interposition of any judicial authority, I request a constable to arrest a person, I make him my agent for that purpose, and, if the arrest is not justifiable on some ground, I am liable as if I had myself arrested him. Accordingly it is important to distinguish clearly cases where the arrest is judicial from those where it is not. The distinction is thus laid down by WILLES, J.(*a*):

Rule laid down by WILLES, J.

"The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

(3) False imprisonment only lies where the defendant has **taken on himself the responsibility of directing the imprisonment.** When a person merely gives information to a police officer, and he arrests on his own initiative, the person giving the information is not guilty of a trespass (*b*), though of course, the police officer may be.

(*a*) *Austin* v. *Dowling*, L. R. 5 C. P. 534, at p. 540; *Manmatha Nath Dat* v. *Chairman of the Cossipore-Chitpore Municipality*, 9 C. W. N. 736. See also *Fisher* v. *Pearse*, 9 Bom. 1; *Sinclair* v. *Broughton*, 9 Cal. 341.

(*b*) *Grinham* v. *Willey*, 4 H. & N. 496.

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So, too, signing a charge sheet is not in itself evidence of anything supporting an action for false imprisonment against the person who signs (*a*). Though when accompanied by other circumstances (as in *Austin* v. *Dowling* (*b*), it may show that the person who signs authorises the imprisonment.

Similarly, where A. informed the police that B. and some others attempted to murder him, and the police after holding an investigation, placed them before a magistrate, but the court of sessions on committal by the magistrate acquitted them, A. was not held to be liable for damages for false imprisonment (*c*).

(4) In an action for false imprisonment, the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas in an action for malicious prosecution, the plaintiff must allege and prove affirmatively its non-existence (*d*).

Habeas corpus.

In addition to the remedy by action, the law affords a peculiar and unique summary relief to a person wrongfully imprisoned viz., the writ of *habeas corpus ad subjiciendum*.

This writ may be obtained by motion made to any superior court, or to any judge when those courts are not sitting, by any of his Majesty's subjects. The party moving must show probable cause that the person whose release he desires is wrongfully detained. If the court or judge thinks that there is reasonable ground for suspecting illegality, the writ is ordered to issue, commanding the detainer to produce the party detained in court on a specified day, when the question is summarily determined. If the detainer can justify the detention, the prisoner is remitted to his custody. If not, he is discharged, and may then have his remedy by action (*e*).

ART. 115.—*Justification of Trespass to the Person.*

A trespass to the person, whether amounting to assault, battery, or false imprisonment, may

(*a*) *Grinham* v. *Willey*, 4 H. & N 496.
(*b*) L. R 5 C. P. 534.
(*c*) *Balbhadder Pande* v. *Basudeo Pande*, 29 All. 44.
(*d*) *Hicks* v. *Faulkner*, 51 L. J. Q. B. 268; *Thakdi Hajji Badruddin Sahib*, 29 Mad. 208.
(*e*) See 31 Car. 2, c. 2, and 56 Geo. 3, c. 100.

Art. 115. be justified by the defendant as being authorised by the exercise of a right at common law or by statute, and if the defendant prove the facts alleged in justification, the plaintiff must fail.

Justification. Trespass to the person may be justified as being (a) in defence of property or person (*a*); (b) as being in the exercise of parental or other special authority (*b*); (c) as being an arrest or imprisonment made by judicial authority (*c*); (d) as being an arrest on suspicion of felony or misdemeanor, or for preservation of the peace (*d*).

But in every case the force used must not exceed that which is reasonably required in the circumstances, and any excess of violence amounts to a trespass.

ART. 116.—*Self-defence as Justification of Assault and Battery.*

Assault and battery is justified if made in self-defence or in defence of real or personal property, provided the force used does not exceed that which is reasonably required in the circumstances.

Any violence in excess of what is reasonably necessary is a trespass.

Self-defence. (1) A battery is justifiable if committed in self-defence. Such a plea is called a plea of "son assault demesne." But, to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*e*). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*f*).

(*a*) See Art. 116.
(*b*) See Art. 117.
(*c*) See Art. 118.
(*d*) See Arts. 119—123.
(*e*) *Cockroft* v. *Smith*, 11 Mod. Rep. 43.
(*f*) *Cook* v. *Beal*, Ld. Raym. 177.

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Defence of property.

(2) A battery committed in defence of real or personal property is justifiable. Thus, if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, **I must first request him to leave.** If after that he still refuses, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*a*).

(3) Lord E. was steward of Doncaster Races. With his sanction, tickets for the grand stand were issued at one guinea each, entitling the holder to come into the stand and the enclosure. The plaintiff, having bought a ticket, came into the enclosure. The defendant, by order of Lord E., asked him to leave, and when he refused, after a reasonable time had elapsed, put him out, using no unnecessary violence, but not returning the guinea:—*Held*, that the defendant was justified, as he was acting by order of Lord E. in removing the plaintiff from Lord E.'s enclosure. The ticket was a revocable licence, and as soon as it was revoked, the plaintiff was a trespasser (*b*). But since the Judicature Act this rule has ceased largely, if not entirely, to be enforceable, and a licensee whose licensor can be compelled by injunction to allow him to do the act licensed cannot be treated as a trespasser because he does that act. In *Hurts* v. *Picture Theatres Limited* (*c*), it was held by the Court of Appeal that a person who had bought a ticket for a seat at a cinema performance could sue *in tort* for damages for forcible ejection by the defendants' servants acting on the erroneous impression that he had obtained admission without payment.

Imprisonment not justified.

(4) It should be added that an owner of property is *not* justified in forcibly detaining another to compel restitution of his property (*d*).

(5) Again, where the plaintiff was travelling in a railway carriage without a ticket, and when he refused to get out of the carriage on being asked to do so, he was forcibly removed, it was held that he was a trespasser, and the removal was therefore not wrongful (*e*). Similarly, where the plaintiff, on his way back from the defendant company's wharf, refused to pay a penny, the charge

(*a*) *Wheeler* v. *Whiting*, 9 C. & P. 262; *Hemmings and Wife* v. *Stoke Pages Golf Club*, [1920] 1 K. B. 720.

(*b*) *Wood* v *Leadbitter*, 13 M. & W. 838.

(*c*) [1915] 1 K. B. 1.

(*d*) *Harvey* v. *Mayne*, 6 I. R. C. L. 471.

(*e*) *Pratap Daji* v *B. B. & C. I. Rail. Co*, 1 Bom. 52.

Art. 116. fixed by the company for exit through a turnstile, and was by force prevented from going through it, it was held that the payment of a penny was a fair condition, and if the plaintiff did not choose to comply with it, the defendants were not bound to let him through (*a*).

ART. 117.—*Justification by Parental or Other Authority.*

Assault and imprisonment may be justified as being done in the lawful exercise of parental or other authority.

Parental and other authority.

(1) A father may moderately chastise his son, and this authority he may delegate to a schoolmaster. Schoolmasters are justified in moderately chastising and in putting restraint on the liberty of their pupils; and this authority extends to chastisement for offences committed whilst going to and returning from school (*b*). But for any excess of punishment an action for assault or false imprisonment lies. So, too, a master may chastise his apprentice (*c*).

Marital authority.

(2) It was formerly thought that a husband had the right of chastising and imprisoning his wife but this can no longer be regarded as the law (*d*).

Naval and military officers.

(3) Officers in the army and navy, and officers of territorials have statutory authority by which they may justify assault and imprisonment of the men under them as being authorised punishments for military or naval offences (*e*).

ART. 118.—*Justification by Judicial Authority.*

When a person is arrested or imprisoned by judicial authority no action for trespass to the

(*a*) *Archibald Nugent Robertson* v. *Balmain New Ferry Co.*, 14 C W N 410 (o c.); 5 I. C. 842.

(*b*) *Cleary* v. *Booth*, [1893] 1 Q. B. 465.

(*c*) *Penn* v. *Ward*, 2 C. M. & R. 338.

(*d*) *R.* v. *Jackson*, [1891] 1 Q. B. 671 [C. A]; *Scully* v. *Scully*, [1921] Times Newspaper 24 June *et seq.*

(*e*) See *Marks* v. *Frogley*, [1898] 1 Q. B 888 [C.A.].

person lies against the judge who gives the authority, or against persons executing his orders, or against the person who set the law in motion. Art. 118.

This general proposition must be read with the qualifications and explanation given in Arts. 8 and 9, where we have discussed the consequences of irregularities and want of jurisdiction. Assuming the judgment, sentence, or order to be regular, and the imprisonment or arrest to be authorised by it, the protection is absolute, and no action for assault or false imprisonment will lie against the judge, or against the persons who carry out the order, or against the person who procured the order from the judge.

ART. 119.—*Power of Magistrates to Arrest or order Arrest.*

If a felony, or breach of the peace, be committed **in view of a justice**, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But if he be not present, he must issue his written warrant to apprehend the offender (*a*).

Except in the case mentioned in this Article a magistrate can only justify an arrest made by his order if he has issued a written warrant for arresting the person arrested. A warrant is an authority to the person to whom it is directed (usually a constable) to arrest the person named therein. It is issued by a justice of the peace upon information given to him that the person to be arrested is suspected of having committed an offence. The magistrate in issuing a warrant acts judicially, and, at common law the warrant was an absolute justification for any arrest made by a constable within the terms of the warrant, provided the magistrate had jurisdiction (*b*). But there are some cases in which Warrant for arrest.

(*a*) 2 Hale P. C. 86.

(*b*) See *ante*, Art. 9

Art. 119. an arrest may lawfully be made without warrant; these are dealt with in the following Articles.

In India any magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant (*a*).

ART. 120.—*Power of Constables and Others to Arrest in Obedience to Warrant.*

No action lies against a constable, or any person acting by his order and in his aid, for anything done in obedience to any warrant issued by any justice of the peace notwithstanding any defect of jurisdiction of such justice (*b*).

NOTE.—At common law an action lay against a constable if he arrested a person upon a warrant issued by a justice who had no jurisdiction to issue it (see *ante*, Art. 9) but constables and those assisting them are protected by this enactment, whether the justice of the peace has jurisdiction to issue the warrant, or not.

The statute does not, however, afford any protection to a constable who does something not authorised by the warrant, as, *e. g.*, if he arrests the wrong person.

ART. 121.—*Arrest for Felony without Warrant.*

(1) **Any person** may arrest another without a warrant **if a felony has in fact been committed,**

(*a*) Code of Criminal Procedure, 1898, s 65.

(*b*) 24 Geo. 2, c. 44, s. 6.

and has reasonable grounds for suspecting that the person arrested has committed the felony. Art. 121.

(2) **A constable** may arrest any person without warrant **if he has reasonable grounds** for thinking that a felony has been committed, and that it has been committed by the person arrested.

Felons.

A treason or felony having *been actually committed*, a private person may arrest one *reasonably*, although erroneously, suspected by him; but the suspicion must not be mere surmise and the defendant must show that the particular felony in respect of which the plaintiff was arrested had been in fact committed (*a*).

In an action for false imprisonment, where the defendant, in order to justify himself, must prove that a felony was in fact committed, and where it appears that if it were committed it could only have been committed by the plaintiff, the fact that the latter has been tried for the alleged felony and acquitted, does not estop the defendant from giving evidence that he did really commit it. For the verdict in the criminal trial was *res inter alios acta*, and is not binding on the defendant in a distinct proceeding (*b*).

Cases of suspected Felony.

As we have seen, a private person can only arrest a suspected felon in cases where a felony has actually been committed by **some one**; and if it should turn out that no such felony was ever committed, he will be liable, however reasonable his suspicions may have been. It would, however, be obviously absurd to require a constable to satisfy himself at his peril that a felony had been in fact committed before acting; and consequently the law provides that a constable may make an arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed, he will not be liable (*c*). The suspicion, however, must be a reasonable one, or the constable will be liable.

(*a*) *Beckwith* v. *Philby*, 6 B. & C. 635.

(*b*) *Cahill* v. *Fitzgibbon*, 16 L R. Ir. 371.

(*c*) *Marsh* v. *Loader*, 14 C. B. (N.S.) 535; *Griffin* v. *Coleman*, 28 L J. Ex. 144.

Art. 121.

Constables.

The constable was formerly an officer appointed for a constablewick or other district, who had at common law certain powers within that district. Police constables are now appointed for counties and boroughs under various statutes, and the constables so appointed have throughout the counties or boroughs for which they are appointed, the powers which at common law a constable had within his constablewick, together with other statutory powers (*a*).

Illustrations.

(1) Thus, a person told the defendant, a constable, that a year previously he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*b*). But on the other hand, where a constable knows that a warrant is out against a man, that is sufficient ground for his reasonably suspecting that a felony has been committed (*c*).

(2) But where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes the other into custody, the party making the charge, and not the constable, is liable (*d*). "It would be most mischievous," Lord MANSFIELD remarks, "that the officer should be bound first to try and at his peril exercise his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*e*).

In India, the powers of private persons and police officers of arrest without warrant are specified in ss. 59 and 54, 55 respectively of the Criminal Procedure Code, 1898.

(*a*) See the Police Acts, especially s. 8 of the County Police Act, 1839, and the Municipal Corporations Act 1882, s. 191.

(*b*) *Hogg* v. *Ward*, 27 L J. Ex. 443.

(*c*) *Creagh* v *Gamble*, 24 L. R. Ir. 458.

(*d*) *Davis* v. *Russel*, 5 Bing. 354.

(*e*) *Griffin* v. *Coleman*, 4 H. & N. 265.

ART. 122.—*Power of Arrest for Preservation of the Peace.*

Art. 122.

For the sake of preserving the peace, any person who sees it broken may without a warrant arrest him whom he sees breaking it at the moment of the affray or immediately after, so long as there is a reasonable prospect of a renewal of the affray (*a*).

The right of arrest stated in this Article is only to prevent disturbances of the peace. It seems that all persons taking part in the affray may be arrested—provided there is a prospect of the affray being renewed—and may be detained till the heat is over, and may then be delivered to a constable to be taken before a magistrate. Thus, when the plaintiff entered the defendant's shop and exchanged blows with a shopman, the defendant was justified in arresting him and handing him over to the constable, on the ground that though the affray had not been actually committed in his presence, yet the plaintiff persisted in remaining on the premises in such circumstances as made it seem probable that he would renew the disturbance unless he was taken into custody (*a*). In such circumstances it seems that a constable is justified in taking the disturber upon the information of one who has seen the affray (even though he was not himself present) if there is a prospect of its being renewed (*a*). There is some authority for saying that a constable may arrest immediately after an affray even though there is no prospect of the affray being renewed; but the proposition is open to doubt.

Although it is the duty of a police officer to take all reasonable steps to prevent a breach of the peace, including, when the circumstances demand it, the arrest and detention of an innocent person, such arrest and detention is undertaken at the peril of the officer responsible, and it is no defence to an action of false imprisonment at the instance of the person so arrested and detained, that the officer *bona fide* believed him to be in danger at the hands of wrongdoers and accordingly detained him for his own benefit (*b*).

(*a*) *Timothy* v. *Simpson*, 1 Cr. M. & R 757.

(*b*) *Connors* v *Pearson*, [1921] 2 I. R. 51 [C. A.]

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ART. 123.—*Arrest for Misdemeanor.*

No person has at common law power to arrest another for a misdemeanor without a warrant; but by various statutes powers of arrest for misdemeanor are given to constables and others to arrest without a warrant.

The following list is not complete, but it contains some examples of statutory powers of arrest for misdemeanor.

Night offenders. (1) Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p. m. and 6 a. m. (*a*).

Malicious injurers (2) The owner of property or his servant, or a constable, may arrest and take before a magistrate anyone *found committing* malicious injury to such property (*b*).

Vagrants (3) Any person may arrest and take before a magistrate one *found committing* an act of vagrancy (*c*).

Brawlers. N.B.—Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which one must refer to the fourth section of the Act.

(4) A constable or churchwarden may apprehend, and take before a Magistrate, any person disturbing divine service (*d*).

Other Acts (5) Many Acts of Parliament give powers of arrest of persons committing offences and refusing to give their names and addresses when requested. See, for instance, the Railways Clauses Consolidation Act, 1845, s. 154, and the Motor Car Act, 1903.

(6) In India, similar powers are conferred under the following Acts: Police Act (V. of 1861); Public Gambling Act (III. of 1867); Criminal Tribes Act (XXVII. of 1871); European Vagrancy Act (IX. of 1874); Forest Act (VII. of 1878); Arms Act (XI. of 1878); Emigration Act (XXI. of 1883); Explosives Act (IV. of 1884); Cantonment Act (XIII. of 1889); Railways Act (IX. of 1890); Fisheries Act (IV. of 1897); Reformatory Act (VIII. of 1897), and other local Acts.

(*a*) 14 & 15 Vict c. 19, s. 11.

(*b*) 14 & 15 Vict. c 19, s. 11; 24 & 25 Vict. c. 97, s. 61.

(*c*) 5 Geo. 4, c 83.

(*d*) 23 & 24 Vict. c. 32, s. 3.

ART. 124.—*Institution of Criminal Proceedings endangers Right of Action for Assault.*

Art. 124

Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged.

If any person shall have **obtained a certificate of dismissal,** or **having been convicted shall have suffered the punishment inflicted,** he shall be released from all further or other proceedings, civil or criminal, for the same cause (*a*).

Comment.

(1) A certificate can only be granted by magistrates where there has been a hearing upon the merits. Where the prosecutor, having obtained a summons, did not attend to give evidence and the magistrates dismissed the summons, the magistrates had no jurisdiction to give a certificate of dismissal (*b*). The fact that the accused has been ordered by the magistrates to enter into recognizances to keep the peace and to pay the recognizance fee, will not constitute a bar to an action (*c*).

(2) The granting a certificate by magistrates where the complaint is dismissed, is not merely discretionary. Magistrates are bound, on proper application, to give the certificate mentioned in this section (*d*) ; and, if they refused to do so, may be compelled by *mandamus* (*e*).

(*a*) 24 & 25 Vict. c 100, ss. 42—45 ; Criminal Procedure Code, 1898, s. 403.

(*b*) *Reed* v. *Nutt*, 24 Q. B. D. 669.

(*c*) *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553.

(*d*) *Hancock* v. *Somes*, 28 L. J. M. C. 196.

(*e*) *Costar* v. *Hetherington*, 28 L. J. M. C. 198.

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(3) The words "from all further or other proceedings civil or criminal, for the same cause" include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person (*a*) consequentially aggrieved thereby (*b*).

ART. 125.—*Amount of Damages.*

In assessing the damages for an assault, or battery, or false imprisonment, the time when, and the place in which, the trespass took place should be taken into consideration (*c*).

Thus, an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks BATHURST, J, in *Tullidge* v. *Wade* (*d*), "to be beaten upon the Royal Exchange than in a private room."

Similarly, a plaintiff was awarded substantial damages for a beating with a shoe, notwithstanding he may not have lost his caste or sustained pecuniary loss or even physical injury by such beating (*e*).

Special damage need not be proved in the case of assault (*f*); and the court must take into consideration the plaintiff's position (*g*) and award damages commensurate with the injury and annoyance caused (*h*), but not to an extent beyond the means and position of the defendant (*i*).

(*a*) *E.g.*, the complainant's husband.

(*b*) *Masper* v. *Brown*, 1 C. P. D 97.

(*c*) See Art. 34 *supra*.

(*d*) 3 Wils. 18, at p. 19.

(*e*) *Bhyran Prasad* v. *Ishari*, 3 N. W. P. R 313.

(*f*) *Hussain* v *Bakir Ali*, W. R (1864), 302.

(*g*) *Jaipal Rai* v *Mukund Rai*, 17 W. R, 280.

(*h*) *Mujumdar* v. *Russel*, W. R. (1864), 370.

(*i*) *McIver* v. *Shangeswar Datta Kunwar*, 6 W. R. 95; *Jaipal Rai* v. *Mukund Rai*, *supra*

CHAPTER XIII.

OF TRESPASS TO LAND AND DISPOSSESSION.

SECTION I.—OF TRESPASS *QUARE CLAUSUM FREGIT.*

ART. 126.—*Definition.*

Trespass *quare clausum fregit* is a trespass committed in respect of another man's land, by entry on the same without lawful authority (*a*). It constitutes a tort without proof of actual damage.

Illustrations.

(1) Thus, driving nails into another's wall, or placing objects against it, are trespasses (*b*); or fox hunting across land against the will of the owner (*c*).

Trespass of cattle.

(2) So, it is generally a trepass to allow one's cattle to stray on to another's land. Thus, where the plaintiff's mare was injured by the defendant's horse biting and kicking her through the fence separating plaintiff's and defendant's land, it was held that this was a trespass for which the defendant was liable apart from any question of negligence (*d*).

Exceeding authority.

(3) Where one has authority to use another's land for a particular purpose, any user going beyond the authorised purpose is a trespass.

(4) So, where a public highway runs across the lands of a landowner, the soil of which is vested in the owner, a

(*a*) See *Kumud Kanta Chakraburty* v. *Bignold*, 68 I. C 664.

(*b*) *Lawrence* v. *Obee*, 1 Stark. 22; *Gregory* v. *Piper*, 9 B. & C. 591.

(*c*) *Paul* v. *Summerhayes*, 4 Q. B. D. 9.

(*d*) *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10; *Srihari Roy* v. *James Hill*, 9 W. R 156. See *Madho* v. *Akaji*, 8 N. L. R. 190.

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member of the public who uses the road not merely in exercise of his right of way, but in order to interrupt the landowner's sport, is guilty of trespass. For he is using the site of the road for a purpose not covered by his limited right of the user (*a*); for the public only have a right to use a highway for passing and repassing and not for loitering or depasturing cattle (*b*), or for watching the training of horses on the adjoining lands (*c*).

Exceptions.

In the following cases a person has lawful authority to enter upon another's land;

Retaking goods.

(1) If one takes and places on his own land another's goods, the latter may enter and retake them (*d*).

Cattle.

(2) If cattle escape on to another's land through the non-repair of a hedge which that other is bound to repair, the owner of the cattle may enter and drive them out (*e*).

Distraining for rent.

(3) So a landlord may enter his tenant's house to distrain for rent, or a sheriff to do execution; but they may not break open the outer door of a house (*f*).

Reversioner inspecting premises.

(4) A reversioner of lands may enter in order to see that no waste is being committed (*g*).

Grantee of easement.

(5) And the grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*h*).

Public rights.

(6) Land may be entered under the authority of a statute (*i*); or in exercise of a public right, as of a highway; or the right to enter an inn, provided there is accommodation (*j*). Also land may be entered to preserve property, *e.g.*, where a fire breaks out the tenant of sporting rights may use such methods as are reasonably believed

(*a*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142 [C. A.].

(*b*) *Doraston* v. *Payne*, 2 H. Bl. 527; and 2 Sm. L. C. 160.

(*c*) *Hickman* v. *Maisey*, [1900] 1 Q. B. 752 [C. A.].

(*d*) *Patrick* v. *Colerick*, 3 M. & W. 483.

(*e*) See *Faldo* v. *Ridge*, Yelv. 74. See Art. 131.

(*f*) *Semayne's Case*, 5 Co. Rep. 91 c; 1 Sm. L. C. 104. For the rules as to execution of civil process in India, see ss. 55 and 62 of the Civil Procedure Code, 1908; for power of distraint, see the Tenancy Acts of the different provinces.

(*g*) *Six Carpenters' Case*, 1 Sm. L. C. 132; 8 Co. Rep. 146 a.

(*h*) *Pomfret* v. *Rycroft*, 1 Saund. 321.

(*i*) *Beaver* v. *Manchester Corporation*, 26 L. J. Q. B. 311.

(*j*) *Six Carpenter's Case*, *supra*; and see *R.* v. *Ivens*, 7 C. & P. 213.

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by him to be necessary to preserve his rights, and he will not be liable if it afterwards turns out that the course he adopted though reasonable, was not necessary (*a*).

(7) Lastly, land may be entered on the ground that it is the defendant's, and that he has a right to immediate possession (*b*). A person in *wrongful* possession cannot treat the rightful owner as a trespasser (*c*). This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands. And a trespasser cannot get damages for forcible entry by the rightful owner unless more force than is necessary is used or there is a want of care in dealing with the trespasser's goods (*d*).

ART. 127.—*Trespassers* ab initio.

(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.

(2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*.

(3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance and not a mere nonfeasance (*e*).

Illustration.

Thus, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their

(*a*) *Cope* v. *Sharp*, 132 L. T. Jo. 178.

(*b*) See *Ryan* v. *Clark*, 14 Q. B. 65.

(*c*) *Taunton* v. *Costar*, 7 Term. Rep. 431.

(*d*) *Hemmings and Wife* v. *Stoke Poges Golf Club*, [1920] 1 K. B. 720.

(*e*) *Six Carpenter's Case*, 1 Sm. L. C. 132; 8 Co. Rep. 146 a.

Art. 127. request supplied with more wine, they refused to pay for it and upon this it was sought to render them trespassers *ab initio*, but without success ; for although they had authority by law to enter (it being a public inn) yet the mere non-payment, being a nonfeasance and not a misfeasance, was not sufficient to render them trespassers (*a*).

At common law this doctrine made a landlord a trespasser *ab initio* when he distrained for rent justly due, and he or his bailiff was guilty of any irregularity. This, however, was very hard on landlords, and by the Distress for Rent Act, 1737 (*b*), an irregularity in such circumstances does not make the distrainer a trespasser *ab initio*, and the tenant can only recover for the special damage sustained by the irregularity.

So if a police officer, whilst lawfully conducting a search assaulted some person on the premises, his entry on the premises was said not to have become unlawful from the outset (*c*).

ART. 128.—*Possession necessary to enable the Plaintiff to maintain an Action of Trespass.*

(1) In order to maintain an action of trespass, the plaintiff must be in the possession of the land; for it is an injury to possession rather than to title. A mere *interesse termini* is not sufficient (*d*). But constructive possession, *i.e.*, by a servant or agent, or a present right to possess although no physical transfer has taken place, is sufficient (*e*).

(*a*) *Six Carpenter's Case*, 1 Sm. L. C. 132 ; 8 Co. Rep. 146 a.

(*b*) 11 Geo. 2, c. 19, ss. 19, 20, and see the Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 8, which gives the same relief in case of any irregularity in a distress for poor rates.

(*c*) *Brojendra Kishore* v. *Luffeman*, 12 C. W. N. 982.

(*d*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.

(*e*) *Glyn* v. *Howell*, [1909] 1 Ch. 666.

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(2) The actual possession of land suffices to maintain an action of trespass against any person **wrongfully** entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*a*).

(3) Where a person is in possession of land, the onus lies upon the primâ facie trespasser to show that he is entitled to enter (*b*).

Illustrations. Possession necessary.

(1) Thus a person entitled to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*c*). But when he has once entered and taken possession, he may maintain trespass against a person who was wrongfully in possession at the time of his entry and continued so afterwards (*d*).

Possession by relation.

(2) A person who is not in actual possession at the time of the trespass may maintain trespass, if at the time of the trespass he was entitled to immediate possession, and at the time of action brought he has actual possession. His possession is then said to relate back in law to the time when the title arose, and he is considered as in possession from that time for the purposes of his action (*e*).

(3) In India a landlord is in constructive possession of the soil through his tenant. The rule of English law that a landlord, who has parted with his possession to a tenant, cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interest, does not apply to India, where tenures are in the nature of a partnership in which the landlord participates with the cultivators in the crop (*f*).

(*a*) *Jones* v. *Chapman*, 2 Ex. 803, at p. 821. See Art. 133 *post.*

(*b*) *Asher* v. *Whitlock*, L. R. 1 Q B 1.

(*c*) *Ryan* v. *Clark*, 14 Q. B. 65.

(*d*) *Butcher* v. *Butcher*, 7 B. & C. 399, at p. 402.

(*e*) *Anderson* v. *Radcliffe*, El. Bl. & El. 806; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493 [C. A.].

(*f*) *Venkatachellam Chetty* v. *Adiappan Ambalam*, 2 Mad. 232. See also, *Ram Chandra* v. *Jiban Chandra*, 1 B. L. R. (A. C. J.) 203; *Manindro* v. *Maniruddin*, 11 B. L. R. App. 40.

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Surface and subsoil in different owners.

(4) Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*a*); but he may for a trespass to the subsoil, as by digging holes, etc. (*b*). So the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*c*), unless the surface is disturbed thereby.

Highways, etc.

(5) When one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege given (*d*). An action for trespasses committed upon it, as, for instance, by throwing stones on to it, or erecting a bridge over it, may therefore be maintained by the owner of the soil (*e*).

ART. 129.—*Trespasses by Joint Owners.*

Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (*f*).

A court of equity will not interfere when a tenant in common acts reasonably for the purpose of enjoying the property held in common, in any way in which an owner

(*a*) *Cox* v. *Mouseley*, 5 C. B. 533, at p. 546.

(*b*) *Cox* v. *Glue*, 17 L. J. C. P. 162.

(*c*) *Keyse v. Powell*, 22 L. J. Q. B 305.

(*d*) *Goodtitle* v. *Alker*, 1 Burr. 133; *Northampton Corporation* v. *Ward*, 1 Wils. 114.

(*e*) *Every* v. *Smith* 26 L. J. Ex. 344; and see Art. 126, Illustration 4, *supra*.

(*f*) See *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

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can enjoy such property without injury to his coparcener (*a*), but where there is a direct infringement of a clear and distinct right, or where the act complained of is proved to be destructive of or detrimental to the enjoyment of the joint property, it will intervene to prevent it (*b*).

Ordinary joint holders.

(1) Among such acts may be mentioned the destruction of buildings (*c*), carrying off of soil (*d*), and expelling the plaintiff from his occupation (*e*).

Co-owners of mines.

(2) But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds; for a coal mine is useless unless worked (*f*).

Party-walls.

(3) There is also one other important case of trespass between joint owners, viz., that arising out of a party-wall. If one owner of the wall excludes the other owner entirely

(*a*) *Dwarkanath* v. *Gopinath*, 12 B. L. R. 189 (note); *Nobin Chandra Mitra* v. *Mahes Chandra Mitra*, 3 B. L. R. Ap. 111; *Massim Mulla* v. *Panjoo Ghoramee*, 21 W. R. 373; *Nocury Lal* v. *Brindavan Chunder*, 8 Cal. 708; *Doorga Lal* v. *Lalla Hanwant* 25 W. R. 306; *Paras Ram* v. *Sherjit*, 9 All. 661; *Mahesh Narain* v. *Nowabad Pathak*, 32 Cal. 837; *Surendra Narayan Sinha* v. *Hari Mohan Misser*, 33 Cal. 1201 (cases of buildings constructed without the consent of the joint owner); *Lala Biswambharlal* v. *Rajaram*, 13 W. R. 337 (note)(erection of a wall); *Sri Chand* v. *Nim Chand*, 13 W. R. 337 (planting a garden); *Shamnagar Jute Factory Co.* v. *Ram Narain*, 14 Cal. 189 (building a jute factory); *Joy Chunder* v. *Bippro*, 14 Cal. 236; *Mohimo Chunder* v. *Madhub Chunder*, 24 W. R. 80; *Srimutty Atarjan Bibi* v. *Shaik Ashak*, 4 C. W. N. 788; *Fazilatunissa* v. *Ijaz Hassan*, 30 Cal. 901; *Ananda Charan Sen* v. *Parvati Nath Sen*, 4 C. L. J. 198 (excavation of a tank).

(*b*) *Gopi Kishen* v. *Hem Chunder*, 13 W. R. 222; *Gurudas* v. *Bijai Govind*, 10 W. R. 171; *Bissombhar* v. *Shib Chandra*, 22 W. R. 286; *Shadi* v. *Anup Singh*, 12 All. 436 (cases of buildings constructed); *Rajendra Lal Gossami* v. *Shama Charan Lahiri*, 5 Cal. 188 (construction of a platform for musicians); *Sher Prasad Singh* v. *Lila Singh*, 20 W. R. 160; *Stalkart* v. *Gopal Pande*, 20 W. R. 168; *Lloyd* v. *Sogra*, 25 W. R. 313; *Debi Prasad* v. *Gajadhar Prasad*, 25 W. R. 374 (planting indigo); *Holloway* v. *Mahomed Uli*, 16 W. R. 140 (erection of a factory); *Watson & Co.* v. *Ram Chand*, 18 Cal. 10; 17 I. A. 110.

(*c*) *Cresswell* v. *Hedges*, 31 L. J. Ex. 497.

(*d*) *Wilkinson* v. *Haygarth*, 12 Q. B. 837.

(*e*) *Murray* v. *Hall*, 7 C. B. 441. See *Nagendra Kumar Nath* v. *Hara Chandra Poddar*, 14 C. L. J. 646; 13 I. C. 376.

(*f*) *Job* v. *Potton*, L. R. 20 Eq. 84.

Art. 129. from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (*a*).

ART. 130.—*Limitation.*

All actions for trespass to land must be commenced within six years next after the cause of action arose (*b*); but when a trespass is continuing, there is a new cause of action constantly arising, and the plaintiff may bring successive actions until the trespass ceases (*c*).

The Indian Limitation Act prescribes a period of three years from the date of trespass, for an action for compensation for trespass on immovable property (*d*).

ART. 131.—*Remedies other than by Action.*

(1) One who is in possession of land may forcibly turn out another who wrongfully enters, using no more force than is reasonably necessary (*e*).

(*a*) *Stedman* v. *Smith*, 26 L. J. Q. B. 314; *Cubitt* v. *Porter*, 8 B. & C. 257; *Watson* v. *Gray*, 14 Ch. D. 192. See *Kanakayya* v. *Narasimhulu*, 19 Mad. 38; *Kalishanker* v. *Bai Keshi*, 6 Bom. L. R. 682; *Ikramullah* v. *Muhammed Yunis Ali* 13 A. L. J. 473; 30 I. C. 33.

(*b*) Limitations Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*c*) *Bowyer* v. *Cook*, 4 C. B. 236.

(*d*) Act IX of 1908, Art. 39.

(*e*) *Hemmings* v. *Stoke Poges Golf Club Ld.*, [1920] 1 K. B. 720.

(2) When animals or other chattels are wrongfully upon land the person in possession may distrain them *damage feasant*. Art. 131.

As to forcibly ejecting a trespasser, see *ante*, Art. 116. In the case of animals or other chattels found trespassing, the law gives the person in possession of the land the right to seize and detain them in order to compel the owner to make reasonable compensation for the damage done (*a*). There is no power of sale; and the power of detention is only in respect of the actual damage done by the offending animal, either to the land itself or to other animals on the land (such as damage caused by one horse kicking another (*b*). This remedy is not however available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *feræ naturæ* reared by a particular person. In such cases the law, not recognising any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or capture them while trespassing. Thus, at common law, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*c*). Comment. Distress damage feasant.

In India, this kind of remedy may not be available, except under statutory authority. The Cattle Trespass Act, however, consolidated the law relating to trespasses by cattle, and contains provisions for impounding cattle and the establishment of pounds. Cattle Trespass Act (I. of 1871).

SECTION II.—OF DISPOSSESSION.

ART. 132.—*Definition.*

Dispossession or ouster consists of wrongully withholding the possession of land from the rightful owner.

(*a*) See *Green* v. *Duckett*, 11 Q. B. D. 275.

(*b*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

(*c*) *Hannam* v. *Mockett*, 2 B. & C. 934, *per* BAYLEY, J. But the killing may amount to a criminal offence by the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 23.

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Specific remedy.

Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment, and since that statute it is by an action for the recovery of land wherein the plaintiff claims possession of the land.

A successful plaintiff gets a judgment for possession and *mesne profits*, *i.e.*, damages for the profits of the land which the plaintiff has lost whilst the defendant was wrongfully in possession, and for any damage done to the land by him whilst he was in possession.

ART. 133.—*Onus of Proof of Title.*

The law presumes possession to be rightful, and therefore the claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*a*).

In actions for possession of land, the plaintiff must, as a general rule, prove not only title but possession and dispossession within twelve years before his suit (*b*). But the High Courts in India are at variance on the question whether in such a suit (other than under s. 9 of the Specific Relief Act) mere proof of previous possession and dispossession is sufficient to entitle the plaintiff for judgment, or proof of title is necessary. The Bombay High Court follows the English law, and holds that a plaintiff in such a case can rely on his possession previous to disposses-

(*a*) *Martin* v. *Strachan*, 5 Term Rep. 107 ; *Chunder Money* v. *Raj. Kishore*, 5 W. R. 246.

(*b*) *Nitressar Singh* v. *Nand Lal Singh*, 8 M. I. A 199 ; *Prahlad Sen* v. *Bodhu Singh*, 12 M. I. A. 275 ; *Bir Chundra* v. *Dy. Collector of Bhalluah*, 13 W. R. [P. C.] 23 ; *Mahomed Ibrahim* v. *Morrison*, 5 Cal. 36 ; *Secretary of State* v. *Kota Bapanamma Garu*, 19 Mad. 165 ; *Kanakammal* v. *Anantamathiammal*, 37 Mad. 293 ; *Lahar Puri* v. *Puran Nath*, 37 All. 298 ; 42 I. A. 115 ; *Ghura* v. *Shitab Kunwar*, 36 All. 248 ; *Gopal Chandra* v. *Rajani Kanta*, 47 Cal. 415 ; *Rama Chandra Martand* v. *Vinayak Venkatesh*, 42 Cal. 84 ; 41 I. A. 290 ; *Aditnarayan* v. *Mahabhir Prasad*, 1 Pat. L. J. 324 ; 35 I. C. 687 ; *Prem Singh* v. *Mokund Singh*, (1912) P. W. R. 30 ; *Durga Debi* v. *Shib Debi*, 4 Lah. L. J. 173 ; *Golap Moni Dasi* v. *Kali Charan Kundu*, 16 I. C. 17 ; *Dharani Kanta Lahiri* v. *Gabar Ali Khan*, 18 I. C. 17 (P. C.).

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sion as against a mere trespasser (*a*). The Calcutta High Court holds the contrary view, and says that mere recent possession would not entitle a plaintiff to recover possession except under the Specific Relief Act (*b*). The other High Courts agree with that of Bombay (*c*).

Possession primâ facie evidence of title.

(1) Thus, mere possession is primâ facie evidence of title until the claimant makes out a better one (*d*).

Title of successful claimant need not be indefeasible.

(2) But where the plaintiff makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible. Thus, where one inclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*e*).

Jus tertii.

(3) Conversely, a man in possession who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore he may set up the right of a third person to the lands, in order to

(*a*) *Premraj Bhavaniram* v. *Narayan Sivaram*, 6 Bom 215 ; *Krishnarao Yeshvant* v. *Vasudev Apaji*, 8 Bom. 371 ; *Krishnacharya* v. *Lingawa*, 20 Bom. 270; *Bhagwan Singh v. Secretary of State for India*, 10 Bom. L. R. 571.

(*b*) *Debi Charan Brodo* v. *Ishar Chandra*, 9 Cal. 39 ; *Ertaza Hussain* v. *Beni Maistri*, 9 Cal. 130 ; *Paramessur Chaudhri* v. *Brojo Lal*, 17 Cal, 256 ; *Sri Gopal* v. *Ayesha Begam*, 26 Cal. 579 ; *Secretary of State for India* v. *Krishnamoni*, 29 Cal. 518 ; *Ram Chandra* v. *Ramanmoni*, 20 C. W. N. 773 ; 36 I. C. 890 ; *Gnanendra Nath* v. *Mohendra Mohini*, 42 I. C. 884.

(*c*) *Walli Ahmed* v. *Ajudhia Kandu*, 13 All. 537 ; *Lacho* v. *Hai Sahai*, 12 All. 46 ; *Sri Gopal* v. *Ayesha Begam*, 29 All. 52 ; *Umra Singh* v. *Ramjidas*, 36 All. 51 ; *Ramzan Khan* v. *Yakub Khan*, 11 I. C. 537 ; *Makhdoom Baksh* v. *Hashim Ali*, 29 I C. 210 ; *Narayan Rao* v. *Dharmachar*, 26 Mad. 514 ; *Subbaraya Chetty* v. *Aiyaswami Aiyar*, 32 Mad. 86 ; *Adinarayana Iyer* v. *Krishnan*, 15 I. C. 97 ; *Kalyanam Basavayya* v. *Alakam Mallappa*, 15 I. C. 613 ; *Neelagara Lingamma* v. *Kinnahal Hampiah*, 17 I. C. 167 ; *Maikal Servai* v. *Thambusami*, 1 L. W. 853 ; 25 I. C. 934 ; *Vaithilinga* v. *Ponnusami*, 41 M. L. J. 78 ; 62 I. C. 396 ; *Kaji Amir Sahib* v. *Kajir Mahomed Ali*, 15 L. W. 430 ; 66 I. C. 237 ; *Sidhu* v. *Dhanna*, 2 Lah. L. J. 271 : *Shaikh Mirza* v. *Abdul Gani*, 4 Pat. L. W. 130 ; 43 I. C. 338 ; *Sahodhra Kuer* v. *Gobardhan*, 2 Pat. L. J. 280 ; 39 I. C. 458.

(*d*) *Ismail Ariff* v. *Mohomed Ghouse*, 20 I. A. 99 ; *Krishnacharya* v. *Lingawa*, 20 Bom. 270 ; *Gangaram* v. *Secretary of State for India*, 20 Bom. 798 ; *Lacho* v. *Hai Sahai*, 12 All. 46 ; *Doe* d. *Smith* v. *Webber*, 1 A. & E. 119 ; *Awadh Behari* v. *Jitu Sahu*, 62 I. C. 243.

(*e*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1 ; *Hub Lal* v. *Jogeshar*, 11 I C. 94.

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disprove that of the claimant (*a*). But the claimant cannot do the same, for possession is in general a good title against all but the true owner (*b*).

Exceptions. Landlord and tenant.

(4) Where the relation of landlord and tenant exists between the plaintiff and defendant, the landlord need not prove his title, but only the expiration of the tenancy; for a tenant cannot in general dispute his landlord's title (*c*), unless a defect in the title appears on the lease itself (*d*). But nevertheless he may show that his landlord's title has *expired*, by assignment, surrender, or otherwise (*e*). The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus, where the plaintiff claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*f*).

Servants and licensees.

The same principle is applicable to a licensee or servant, who is estopped from disputing the title of the person who licensed him (*g*).

In India, no tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such property; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given (*h*).

(*a*) *Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945; *Girdhari Lal* v. *Government of Bengal*, 12 M. I. A. 448; *Chandra Kanta Pathak v. Bhagjur Bepari*, 1 I. C. 525.

(*b*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Richards* v. *Jenkins*, 17 Q. B. D. 544; *Bazmir Khan* v. *Rustam Khan*, 54 I. C. 398; *Adinarayana* v. *Krishnan*, [1912] M. W. N. 707; 15 I. C. 97.

(*c*) *Delaney* v. *Fox*, 26 L. J. C. P. 248.

(*d*) *Saunders* v. *Merryweather*, 35 L. J. Ex. 115; *Doe* d. *Knight* v. *Smythe*, 4 M. & S. 347.

(*e*) *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065; *Walton* v. *Water-house*, 1 Wms. Saund. 420.

(*f*) *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531.

(*g*) *Doe* d. *Johnson* v. *Baytup*, 3 A & E. 188; *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643 [Ex. Ch.]; *Dukhimoni Dasi* v *Tulsi Charan* 13 I. C. 512.

(*h*) Indian Evidence Act (I. of 1872), s. 116.

ART. 134.—*Limitation.*

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No person can bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (*a*).

Exceptions. Disability.

(1) Where claimants are under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased: provided that no action shall be brought after thirty years from the accrual of the right (*b*).

(2) Where the defendant has been guilty of some fraud or wrong and the plaintiff is unaware of the existence of his cause of action the period of limitation does not begin to run till the existence of his cause of action becomes known to the plaintiff (*c*).

Acknowledgment of title.

(3) When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment in writing and signed, of the latter's title, then the right of such last-mentioned person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*d*).

Ecclesiastical corporations.

(4) The period in the case of ecclesiastical and eleemosynary corporations is sixty years (*e*).

(*a*) 37 & 38 Vict. c. 57, s. 1, replacing 3 & 4 Will. 4, c. 27, s. 2; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297. The owner of the legal estate must, however, be a party to the action, *Allen* v. *Woods*, 68 L. T. 143 [C. A.]; Indian Limitation Act, 1908, Arts. 136—144.

(*b*) 37 & 38 Vict. c. 57, ss. 3—5, replacing 3 & 4 Will 4, c. 27, ss. 16, 17.

(*c*) *Oelkers* v. *Ellis*, [1914] 2 K. B. 139. See Indian Limitation Act, 1908, s. 18.

(*d*) *Ley* v. *Peter*, 27 L. J. Ex. 239; Indian Limitation Act, 1908, 19.

(*e*) 3 & 4 Will. 4, c. 27, s. 29.

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ART. 135.—*Commencement of Period of Limitation.*

The right to maintain ejectment accrues, (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the death of the last rightful owner (*a*); and, (b) in respect of an estate in reversion or remainder or other future estate or interest, at the determination of the particular estate. But a reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the time when he himself becomes entitled to the possession, whichever of these periods may be the longer (*b*).

Discontinuance.

(1) Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (*c*). Therefore, in the case of mines, where they do not belong to the surface owner, the period cannot commence to run until someone actually works them; and even then it only commences to run *quâ* the vein actually worked (*d*).

Continual assertion of claim.

(2) No defendant is deemed to have been in possession of land merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action (*e*). Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period. As to what acts constitute dispossession, see *Littledale* v. *Liverpool College* (*f*).

(*a*) 3 & 4 Will. 4, c. 27, s. 3. See Indian Limitation Act, 1908, Arts. 142, 144.

(*b*) 37 & 38 Vict. c. 57, s. 2. See Indian Limitation Act, 1908, Arts. 140, 141.

(*c*) See *Smith* v. *Lloyd*, 23 L. J. Ex. 194; *Cannon* v. *Rimington*, 12 C. B. 1.

(*d*) See *Low Moor Co.* v. *Stanley Coal Co*, 34 L. T. 186, 187 *Ashton* v. *Stock*, 6 Ch. D. 726.

(*e*) 3 & 4 Will 4, c 27, ss. 10, 11.

(*f*) [1900] 1 Ch. 19 [C. A.].

CHAPTER XIV.

TRESPASS TO GOODS, DETENTION AND CONVERSION OF GOODS.

ART. 136.—*Definitions.*

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There are three specific torts in respect of the possession of goods:

(i) *Trespass*, which consists in wrongfully taking goods out of the plaintiff's possession, or forcibly interfering with them whilst they are in his possession;

(ii) *Detention of goods or detinue*, which consists in wrongfully detaining from the plaintiff goods to the immediate possession of which he is entitled;

(iii) *Conversion*, which consists in the defendant's wrongfully converting to his own use goods to the possession of which the plaintiff is entitled, by taking them away, detaining them, destroying them, delivering them to a third person, or otherwise depriving the plaintiff of them.

The ancient causes of action for torts to goods were trespass and detinue. The action of "trover and conversion" was invented later, and was founded on the fiction that the defendant had found the plaintiff's goods and converted them to his own use.

The broad distinction between trespass on the one hand and conversion and detinue on the other hand, is that trespass

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is the only cause of action where the goods interfered with remain in the possession of the plaintiff; whereas an action for conversion or detention lies when the plaintiff is wrongfully deprived of the possession of his goods by the defendant.

Trespass.

Trespass may be the result of an intentional conscious act of taking or touching goods, or may be the result of mere negligence. So where A. drives his carriage so negligently that it collides with B.'s carriage, this is a trespass (*a*), just as, if he collides with B.'s person, it would be trespass to the person. But it seems that there must be either intention or negligence, and a merely accidental touching does not constitute trespass (*b*).

The principal distinction between detention and conversion is in the remedy sought.

Detinue for return of goods.

When the defendant has got possession of the plaintiff's goods (whether wrongfully in the first instance, or by keeping them wrongfully after having lawfully obtained possession) the plaintiff can sue either for wrongful detention or for conversion, but generally an **action for detention** is brought where the defendant is at the time of action brought in wrongful possession of **specific goods**, such as a horse or a picture, which the plaintiff wishes to have returned to him.

Conversion for damages.

Conversion is the appropriate remedy where the plaintiff seeks merely **to recover as damages** the value of goods of which the defendant has deprived him. Thus, it is the proper remedy where the defendant no longer has possession of the goods, or where they cannot be identified, such as so many bushels of corn, or so much coal.

Actions for conversion or detention of goods are often brought to try title to goods, and, if the plaintiff proves his title, it is no defence that the defendant thought he himself had a good title. Thus, a person who buys A.'s goods from B. (thinking they are B.'s), and then, quite innocently, sells them to C., is guilty of a conversion, as also is C. if he refuses to give them up, or consumes them.

Justification.

A trespass may be justified as being done in self-defence or in exercise of a right, or in other ways illustrated by the examples below.

Illustrations.

(1) If one draws wine out of a cask and fills up the deficiency with water, he converts the whole cask. He converts the wine he draws out by taking it, and the

(*a*) *Lotan* v. *Cross*, 2 Camp. 464. (*b*) See *ante*, Art. 3.

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remainder by turning it into something different, and so destroying it (*a*).

(2) Two notes were stolen from A., which B. (not a bonâ fide holder in due course) tendered to C. in payment for certain articles ; B. not knowing C. brought D., a friend of his, and made the purchase through D. It was held that the part that D. took in the transaction amounted to a conversion of the notes to his own use and that he was liable to A. (*b*).

(3) So, where a hundi, drawn on the defendants and endorsed to R., was stolen in transmission by post, and D. substituted his name and drew the money for the defendants, they were held guilty of conversion of the hundi and liable in trover to the plaintiff (*c*).

Excessive execution.

(4) So, again, if a sheriff sells more goods than are reasonably sufficient to satisfy a writ of *fieri facias*, he will be liable for a conversion of those in excess (*d*).

Injuring animals.

(5) Beating the plaintiff's dogs is a trespass (*e*)

Intention immaterial.

(6) The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewellery from a drawer in the room in which he had died to a cupboard in another room, in order to insure its safety, and the jewellery was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, and that it was no defence that she had removed the goods bonâ fide for their preservation, and she was consequently held liable for nominal damages. It was suggested, however, that if the removal was in fact reasonably necessary for their preservation and was carried out in a reasonable manner, that might have been a good defence (*f*). But, on the other hand, the finder of a lost chattel does not commit a tort by merely warehousing or otherwise safeguarding it for a reasonable time until the true owner be discovered, so long as he is not unnecessarily officious (*g*). However, the intention to deny

(*a*) *Richardson* v. *Atkinson*, 1 Stra. 576.

(*b*) *Kissory Mohun Roy* v. *Rajnarayan Sen*, 1 Hyde, 263.

(*c*) *Ganesadas Ramnarayan* v. *Laxmi Narayan*, 18 Bom. 570.

(*d*) *Aldred* v. *Constable*, 6 Q. B. 370, at p. 381.

(*e*) *Dand* v. *Sexton*, 3 Term Rep. 37.

(*f*) *Kirk* v. *Gregory*, 1 Ex. D. 55.

(*g*) See *per* BLACKBURN, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 757, at p. 766.

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the owner's right or to assert a right not inconsistent with that of the owner is proved where the goods are used or taken as his own property by the defendant (*a*).

(7) Again, where the owner of household furniture assigned it by bill of sale to the plaintiff, and subsequently employed the defendants (who were auctioneers) to sell it for her by auction, and they sold *and delivered possession* to the purchaser from them, they were held liable, although they knew nothing of the bill of sale (*b*). It is important, however, to note that the tort there was the *delivering* of the furniture to the purchaser, and not the mere selling of it (*c*).

Conversion by innocent purchaser.

(8) So the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title (*d*). Thus, in the leading case of *Hollins* v. *Fowler* (*e*), it was laid down that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

(9) Where, however, the true owner has parted with a chattel to A. upon an actual contract, though there may be circumstances which enable that owner to set the contract aside for fraud, yet a bonâ fide purchaser from A. will obtain an indefeasible title (*f*).

Sale in market overt.

(10) To this rule, however, there is an exception, that a sale of goods in market overt gives a good title to the purchaser, although the seller has no title. So a purchaser in market overt cannot be sued in an action for conversion if he parts with the goods or refuses to give them up on demand. But this rule only protects the purchaser, and the seller in open market is guilty of conversion by selling

(*a*) *Lancashire and Yorkshire Rail. Co.* v. *MacNicoll*, 88 L. J. K. B 601.

(*b*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495.

(*c*) See *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502; and *per* BRETT, J., in *Fowler* v. *Hollins*, L. R. 7 Q. B. 616 [Ex. Ch.], at p. 627.

(*d*) Sale of Goods Act, 1893, s. 21, unless it be a negotiable security (as to which see *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 591, and Sale of Goods Act, 1893, s. 25 (2)); or unless he buys it in market overt (Sale of Goods Act, 1893, s, 22), and not even then if it was stolen and the thief had been prosecuted to conviction (*ibid.*, s. 24).

(*e*) L. R. 7 H. L. 757.

(*f*) Sale of Goods Act, 1893, s. 23.

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and delivering goods to which he has no title (*a*). The sale must be an open sale in a lawfully constituted market, and made according to the usages of the market. By special custom all shops in the city of London are market overt between sunrise and sunset for the sale of goods of the kind which by the trade of the owner are there put for sale by him. But the sale must be *by* the shopkeeper not *to* him, and it must take place in the open part of the shop, not in a room at the back (*b*).

Revesting on prosecution of thief.

Of this common law exception there is, however, a modification by statute, first enacted by 21 Hen. 8, c. 11, and now contained in s. 24 of the Sale of Goods Act, 1893, viz., that where goods are *stolen* and the thief is prosecuted to conviction, the property revests in the original owner, notwithstanding a sale in market overt. But note that until the conviction of the thief the property is in the person who has acquired it by sale in market overt, and no act of his before the conviction of the thief is a conversion. So, where the plaintiff's sheep were stolen and sold in open market to the defendant, and the defendant then resold and delivered them to another, and subsequently the thief was prosecuted and convicted, though the property then revested in the plaintiff, he had no remedy against the defendant. For when the defendant sold the sheep they were his, not having then revested in the plaintiff (*c*).

The common law doctrine of sale in overt market is not applicable to India. The Indian Contract Act enacts specifically that no seller can give to the buyer of goods a better title to those goods than he has in himself, except in three cases (*d*). In the case of stolen property, no property passes to the innocent purchaser, and on the conviction of the offender the property must be handed over to the real owner. "When an inquiry or a trial in any criminal court is concluded, the court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence (*e*). This rule, however, has no application to a currency note, which, like

(*a*) *Peer* v. *Humphrey*, 2 A. & E. 495; *Ganley* v. *Ledwidge*, 14 L. R. Ir. 31 [C. A.].

(*b*) *Hargreave* v. *Spink*, [1892] 1 B. 25

(*c*) *Horwood* v. *Smith*, 2 Term Rep. 750.

(*d*) Indian Contract Act (IX. of 1872), s. 108.

(*e*) Code of Criminal Procedure (V. of 1898), s. 517 (1).

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money, does not stand on the same footing as other chattels. The property in money passes by mere delivery, and nothing short of fraud will graft an exception upon that rule (*a*).

Justification.

(11) It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act. Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*b*).

Self-defence or defence of property.

(12) A trespass committed in self-defence, or defence of property, is justifiable. Thus, a dog chasing sheep or deer in a park, or rabits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*c*). But a man cannot justify shooting a dog, on the ground that it was chasing animals *feræ naturæ* (*d*), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*e*). So, too, though I may use reasonable force to remove trespassing animals from my land, I am liable in trespass if I use an unreasonable amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*f*).

In exercise of right.

(13) A trespass committed in exercise of a man's own rights is justifiable. Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful (*g*).

Legal authority.

(14) Due process of law is a good justification, as, for example, an execution under a writ of *fieri facias* (*h*).

(*a*) *Q. E.* v. *Joggessur Mochi*, 3 Cal. 379; *Dasaundhi* v. *Imam-ud-din*, [1905] P. R. 18; *Maung Aung Pu* v. *Maung Si Maung*, 12 I. C. 809; *Subramaniya* v. *Jowali Angadi*, (1911) 1 M. W. N. 370; 11 I. C. 584; *In re Pandarinath P. Revankar*, 40 Bom. 186; *Bodomal Kishinchand* v. *Emp.*, 5 S. L. R. 153; 13 I. C. 213. In the case of coins, see *Kunshiram* v. *Secretary of State*, [1890] P. R. 83; *Soni* v. *Emp.*, 4 S. L. R. 255; 11 I. C. 581.

(*b*) *Slater* v. *Swann*, 2 Stra. 872.

(*c*) *Wells* v. *Head*, 4 C. & P. 568; *Turner* v. *Jugmohan Singh*, 27 All. 531.

(*d*) *Vere* v. *Lord Cawdor*, 11 East, 568.

(*e*) *Read* v. *Edwards*, 34 L. J. C. P. 31.

(*f*) *King* v. *Rose*, 1 Freem. 347.

(*g*) As to right of stoppage in transit, see ss. 99—106, Indian Contract Act.

(*h*) See *ante*, Art. 9.

ART. 137.—*Possession necessary to maintain an Action for Trespass.*

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(1) To maintain an action for *trespass to* goods, the plaintiff must at the time of the trespass have been in possession of the goods.

(2) Any possession however temporary is sufficient against a wrongdoer.

(3) Although he cannot maintain an action for trespass, the person entitled to the reversion of goods may maintain an action for any permanent injury done to them (*a*).

Possession.

To enable him to bring an action for trespass, the plaintiff need not have actual physical possession; it is enough if the goods are in the physical possession of a servant or other person who holds them for him. This kind of possession is sometimes called "**constructive possession.**" So, too, where goods are in a warehouse or in a ship, and the owner has the documents of title by means of which he can get actual possession, he may be said to have constructive possession. Another kind of possession is "**possession by relation.**" An administrator or executor has possession by relation from the moment of the death of the intestate or testator, for his title relates back to the death. And this possession by relation is enough to support an action against a wrongdoer, although at the time of the wrongful act the administrator or executor had neither title nor actual possession, nor the right to immediate possession (*b*).

Illustrations.

(1) A master of a ship, as bailee of the cargo, has actual possession, and can sue for trespass (*c*), as also can a person who has possession of another's cattle under a contract of agistment (*d*).

(*a*) *Tancred* v. *Allgood*, 28 L. J. Ex. 362; *Lancashire Wagon Co.* v. *Fitzhugh*, 6 H. & N. 502; *Mears* v. *London and South Western Rail. Co.*, 11 C. B. (N.S.) 850.

(*b*) *Tharpe* v. *Stallwood*, 5 Man. & Gr. 760; and see *Kirk* v. *Gregory*, 1 Ex. D. 55.

(*c*) *Moore* v. *Robinson*, 2 B. & Ad. 817.

(*d*) *Rooth* v. *Wilson*, 1 B. & A. 59.

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(2) Upon the same principle it has been held that the Postmaster-General, as bailee in possession of letters delivered to him for carriage, can recover their value in an action for negligence against a wrongdoer, even though he would not himself be liable to the owners for their loss (*a*).

(3) An owner of a chattel who has gratuitously lent it to another may maintain trespass, as it is considered to be in his possession, although the borrower has the physical possession. A loan does not, in contemplation of law, take the possession out of the owner (*b*).

ART. 138.—*Trespassers* ab initio.

If one, taking a chattel by authority given him by law, abuses his authority, he renders himself a trespasser *ab initio* (*c*).

Thus, where the defendant took a horse as an astray, as he was authorised by law to do, and then worked the horse (which he had no authority to do), he became a trespasser *ab initio*. But the rule only applies where the original authority is given by law—not where it is given by the parties—and the abuse must be misfeasance, not mere nonfeasance (*d*).

ART. 139.—*Conversion and Detention.*

(1) To maintain an action for wrongful detention the plaintiff must, as against the defendant, be entitled to immediate possession at the time of action brought.

(*a*) *The Winkfield*, [1902] P. 42 [C. A.].
(*b*) *Lotan* v. *Cross*, 2 Camp. 464.
(*c*) *Oxley* v. *Watts*, 1 Term Rep. 12. (*d*) *Ibid.*

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(2) To maintain an action for conversion the plaintiff must, as against the defendant, have been entitled to immediate possession at the time of the conversion.

(3) The judgment in an action for wrongful detention is for the return of the goods and damages for their detention.

(4) The judgment in an action for conversion is for damages. The measure of damages is the value of the goods at the time of the conversion (*a*).

Comment.

The plaintiff need only show that he is entitled as against the defendant. He need not show a good title to the goods as against every one; and as possession is always a good title against a wrongdoer, it is sufficient if the plaintiff shows that he had possession and the defendant has taken them out of his possession. In these actions the plaintiff is not required to show that the defendant did not act in good faith (*b*).

Judgment.

In an action for wrongful detention the plaintiff gets judgment for the return of the specific goods detained or (if the plaintiff prefers) their value, and the court may order that execution shall ensue for the return of the property itself; accordingly, in this form of action, the goods must be specific ascertained goods. The plaintiff may also have damages for the detention of the goods.

In an action for conversion the judgment is for damages only, and if the defendant **satisfies the judgment,** he thereby pays for the goods, and they thereupon vest in him as if he had bought them (*c*).

Proof of conversion or detention.

A conversion or detention is commonly proved by *demand and refusal.* If the defendant has the plaintiff's goods in his possession, this is not necessarily in itself a conversion

(*a*) See note *ante*, p 99.

(*b*) *Pridgeon* v. *Mellor*, 28 T. L. R. 261.

(*c*) *Cooper* v. *Shepherd*, 3 C. B. 266. But judgment without satisfaction does not change the property in the goods (*Brinsmead* v. *Harrison*, L. R. 6 C. P. 584); and see *Eastern Construction Co., Limited* v. *National Trust Co., Limited*, [1914] A. C. 197.

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or wrongful detention. If, however, he treats them as his own, as by delivering them to a third person or consuming them, he thereby converts them to his own use. Where there is nothing else in the nature of a conversion, the plaintiff should demand their return, and if the defendant refuses to return them, his refusal is evidence of a conversion. It is also evidence of wrongful detention, and the plaintiff may then bring his action and will succeed, unless the defendant can justify his refusal to return the goods on demand (*a*).

Illustrations.

Possession of bailee.

(1) If a hirer or carrier of my goods wrongfully delivers them to a third person, the bailment is thereby determined, and the immediate right of possession at once revests in me, so that I can sue in conversion either the bailee or the person to whom he has delivered them (*b*). Under the Indian Contract Act a purchase from a gratuitous bailee or a person entitled only to a qualified possession cannot pass a valid title to the purchaser (*c*).

(2) Where goods are pledged, no action for conversion or detention will lie against the pledgee for selling them or repledging them until tender of the debt has been made and refused (*d*).

(3) But where a pledgee having power to sell for default takes over the property pledged, as if upon a sale to himself, with the pledgor's consent, he was held guilty of conversion (*e*).

Sale of property under lien.

(4) And so, when, by a sale of goods, the property in them has passed to the purchaser, subject to a mere lien

(*a*) See *Van Appen & Co., Ld.* v. *Tredegars Ld.*, 37 T. L. R. 504; *Miller* v. *Dell*, [1891] 1 Q. B. 468 [C. A.]; *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031; *Nandlal Thakersey* v. *Bank of Bombay*, 11 Bom. L. R. 926; 4 I. C. 652.

(*b*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Wyld* v. *Pickford*, 8 M. & W. 443.

(*c*) *Shanker Murlidhar* v. *Mohan Lal Jadu Ram*, 11 Bom. 704; *Le Goyt* v. *Harvey*, 8 Bom. 501; *Biddomoyee Dabee* v. *Sitaram*, 4 Cal. 497; *Seager* v. *Hukma Kissa*, 24 Bom. 458; *Naganada Davy* v. *Bappu Chettiyar*, 27 Mad. 424; *Greenwood* v. *Holquette*, 12 B. L. R. 42; 20 W. R. 467; *Maung Po O* v. *Ma I*, L. B. R. (1893—1900), 357; *Nandlal Thakersey* v. *Bank of Bombay*, *supra*.

(*d*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate* L. R. 3 Ex. 299 [Ex. Ch.].

(*e*) *Neckram Dubay* v. *Bank of Bengal*, 19 Cal. 322.

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for the price, the vendor will be liable for conversion if he resells and delivers them to another. But in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*a*).

Possession of trustee.

(5) A trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his *cestui que trust*, for he has in law the right to immediate possession (*b*).

Possession of a mere finder.

(6) In the leading case of *Armory* v. *Delamirie* (*c*), it was held that the finder of a jewel could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner. In short, a defendant cannot set up a *jus tertii* against a person in actual possession.

(7) But the finder of lost goods has no title against any one who can show a better title. So, where a workman found a ring embedded in mud on land which was in the possession of the plaintiff's, it was held that, as finder, he acquired no title against them. The plaintiffs being in possession of the land were in possession of the ring also. Consequently, the finder was liable to them in an action for detention when he refused to give it up to them (*d*).

(8) A bailee of goods may maintain trespass or conversion against a wrongdoer, by virtue of his having the actual possession (*e*). So also may the bailor as he is in possession by the bailee. Thus, when an article is lent the borrower or the lender may bring an action against a wrongdoer (*f*), So also may the owners of goods let on hire (*g*), and the pledgee of goods pawned (*h*). The bailee, if he succeeds in

(*a*) *Page* v. *Cowasjee Eduljee*, L. R. 1 P. C. 127; *Martindale* v. *Smith*, 1 Q. B. 389.

(*b*) *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*c*) 1 Sm. L. C. 356.

(*d*) *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44.

(*e*) *Nandlal Thakersey* v. *Bank of Bombay*, *supra*.

(*f*) *Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Burton* v. *Hughes*, 2 Bing. 173.

(*g*) *Cooper* v. *Willomatt*, 1 C. B. 672.

(*h*) *Swire* v. *Leach*, 18 C. B. (N.S.) 479.

Art. 139 an action of conversion, recovers the full value of the goods as damages, and must account to the bailor (*a*).

ART. 140.—*Waiver of Tort.*

When a conversion consists of a wrongful sale of goods, the owner of them may elect to waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*b*). But, by waiving the tort, the plaintiff estops himself from recovering any damages for it (*c*).

Once having elected to treat the transaction as a sale, as by receiving or suing for part of the purchase-money, the plaintiff cannot afterwards sue in tort. If an action for money had and received is brought, that is a conclusive election to waive the tort: and so the bringing of an action of conversion or trespass is a conclusive election not to waive the tort. These are conclusions of law (*d*). In other cases it is a question of fact whether or not there has been an election; and if the facts show an intention to retain the remedy in tort against one tort-feasor, a settlement with another one will not affect that right, although the plaintiff may have sued alternately both in tort and for money had and received, and although he may have got an interim injunction restraining any dealings with the money (*e*).

(*a*) See *The Winkfield*, [1902] P. 42 [C. A.], where the principles and cases are fully discussed; *Eastern Construction Co.* v. *National Trust Co.*, [1914] A. C. 197.

(*b*) *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216; *Oughton* v. *Seppings*, 1 B. & Ad. 241; *Nothey* v. *Buck*, 8 B. & C. 160.

(*c*) *Brewer* v. *Sparrow*, 7 B. & C. 310.

(*d*) *Smith* v. *Baker*, L. R. 8 C. P. 350.

(*e*) *Rice* v. *Read*, [1900] 1 Q. B. 54 [C. A.].

ART. 141.—*Trespass and Conversion by Joint Owners.*

A joint owner can only maintain trespass or conversion against his co-owner, when the latter has done some act inconsistent with the joint ownership of the plaintiff (*a*).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby (*b*).

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in market overt, so as to vest the whole property in the purchaser, it would be a conversion (*c*).

ART. 142.—*Remedy by Recaption.*

When anyone has been unlawfully deprived of his goods, he may lawfully reclaim and take them wherever he happens to find them, but not in a riotous manner or attended with breach of the peace, and he can justify an assault made for the purpose of recapturing after demand and refusal (*d*).

ART. 143.—*Remedy by Action of Replevin.*

The owner of *goods distrained* is entitled to have them returned upon giving such security as the law requires to prosecute his suit without

(*a*) 2 Wms. Saund. 470; and see *Jacobs* v. *Seward*, L. R. 5 H. L. 464.

(*b*) *Barnardiston* v. *Chapman*, cited 4 East, 121.

(*c*) *Mayhew* v. *Herrick*, 7 C. B. 229.

(*d*) *Blades* v. *Higgs*, 30 L. J. C. P. 347.

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delay against the distrainer, and to return the goods if a return should be awarded (*a*).

The application for the replevying or return of the goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes them to be replevied to the person from whom they were seized, on his giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds £20, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (*b*).

ART. 144.—*Orders for Restitution of Stolen Goods.*

If any person who has stolen property is prosecuted to conviction by or on behalf of the owner, the property is to be restored to the owner, and the court before whom such person is tried has power to order restitution of the property to the owner (*c*).

Therefore, even if the goods were sold by the thief in market overt, yet, by this section, they must be given up to the original owner. Apparently where a bailee allows the court to make an order for restitution without informing the court that he holds on behalf of a bailor, he is liable to the bailor for the loss of the article (*d*).

(*a*) See County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 134—137.

(*b*) 51 & 52 Vict. c. 43, ss. 133—136.

(*c*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100; Code of Criminal Procedure (V. of 1898), s. 517 (1).

(*d*) *Ranson* v. *Platt*, [1911] 1 K. B. 499. See 2 P. R. Cr. 1908; L. B. R (1892—1902) 84.

QUESTIONS

ON

UNDERHILL'S TORTS.

BY C. O. BLAGDEN, M.A.,
OF GRAY'S INN, BARRISTER-AT-LAW.

AND

BY THE PRESENT EDITOR.

NOTE.

These questions have been drawn up with a view to assisting students in mastering the principles of the Law of Torts, and in testing their knowledge of that subject by reference to the pages of the present work. The numbers at the end of each question give the pages where the required information can be found.

QUESTIONS.

1. Define "tort," and give reasons for your definition. [1-3]

2. Discuss the definition of a tort as "a wrong independent of contract." [1-2]

3 Explain and illustrate the distinction between "tort," "crime," "breach of contract," "breach of trust," and "moral turpitude." Does the fact that a wrongful act (or omission) happens to fall under more than one of these heads affect the common law remedy? [1, 2, 34, 43]

4. What elements are combined in the legal conception of "tort"? Give illustrations of each. [3]

5. Discuss and illustrate the maxim that *injuria sine damno* is actionable, but *damnum sine injuria* is not What is the precise meaning of the words *damnum* and *injuria* in this connection? [3-5]

6. When is actual damage a necessary part of the cause of action in tort, and when is it not? [4-5]

7. A man is unlawfully detained for a short time, but so as to suffer no loss whatever thereby either in money, health, comfort, or otherwise. On another occasion he is, by fraudulent misrepresentations as to existent facts, deceived into a belief, which, if he acted on it, would result in pecuniary loss to him; but he finds out the fraud in time and does not in fact suffer any loss whatever. Can he maintain an action against the person (a) who detained him, (b) who deceived him? [3-6, 190]

8. Distinguish, with illustrations, between—

(a) An absolute private right;

(b) A qualified private right; and

(c) A public right.

What is the importance of these distinctions in relation to the law of torts? [5-8]

9. Under what circumstances can an individual maintain an action for damages for the infringement of a public right? Give illustrations. [7]

10. Give instances of unlawful acts which, though causing damage to particular individuals, nevertheless give rise to no action for damages at common law. [7]

11. Illustrate and explain the distinction between a public and a private nuisance. Under what circumstances can an action for damages be brought in respect of the former? [7-8]

12. A walks on B's land without having any legal right to do so but without doing any damage to it Can B maintain an action against A ? Would it make any difference if A. had merely stepped on B's land in order to avoid being run over by C.'s motor car ? [7, 313]

13. A. owns a shop which greatly depends for its custom upon its attractive appearance ; a gas company erects, on its own land, a gasometer, hiding the shop from the public and thereby seriously damaging A.'s trade. Can A. maintain an action for damages against the company ? Give reasons for your answer. [4-5]

14. A landowner by working his mines causes subsidence of the surface, resulting in the collection of rainwater which percolates into his neighbour's mine and thereby causes trouble and expense to the neighbour. Can the latter maintain an action for damages ? [4-5]

15. A., a legally qualified voter, of Conservative views, duly tenders his vote at a parliamentary election to the returning officer, who wrongfully refuses to register it. The Conservative candidate is returned by a large majority. Has A. any cause of action against the returning officer, and, if so, on what principle ? [6]

16. A. unlawfully obstructs a public highway, thereby delaying B., amongst other members of the public in passing along it. Can B. maintain an action for damages against A ? [7]

17. A leaves an unfenced hole on his land immediately adjoining a public highway. B., passing along in the dark, falls into the hole and breaks his leg Can B. maintain an action for damages against A. ? [10, 204]

18. A. keeps a coffee-house in a narrow street. His neighbour B carries on a business as auctioneer, and is constantly loading and unloading goods into and from vans in the street to such an extent as to create a public nuisance and to obstruct A's business and inconvenience A's customers. Can A maintain an action for damages against B., and, if so, on what principle ? [7-8]

19. A's servant is so seriously injured in a railway accident due to the negligence of a signalman employed by the railway company, that A. loses his services for six months Can A maintain an action for damages against the company ? If, instead of being injured, the servant is killed outright, can A. maintain an action ? [174, 86]

20. To what extent is the voluntary nature of the wrongful act or omission an essential element in a tort ? [8-9]

21. Is it ever a good defence to an action for tort, to show that the wrongful act was done in pursuance of instructions received from a third party and was not known by the defendant to be wrongful ? [9]

22. Which, if any, of the following would constitute a good defence to an action for damages in tort—

(a) that the defendant did not intend to do harm ;

(b) that he did not know his act was illegal ;

(c) that the damage done would not have happened but for an accident which could neither be prevented nor foreseen ;

(d) that the act which did the damage was done by leave of the person damaged. [8-10]

23. A butcher's man leaves his horse and cart unattended in the road while he serves meat at the back door of a neighbouring house in accordance with his usual custom. The horse, which has generally remained quite quiet under such circumstances, in frightened by a motor car, runs away and injures a lady Has the lady a cause of action against the butcher's man ? [14]

24. A. has an unguarded pit on his premises B, coming on to the premises on lawful business, falls into the pit and is seriously injured. Has B a cause of action against A, and why ? [10-11]

25. A. plants a yew tree in his back garden, and in course of time it grows so as to project into B.'s meadow. One of B.'s horses kept in the meadow eats the projecting shoots and dies in consequence. Under what circumstances and on what principle, if at all, has B. a cause of action against A. ? [14]

26. A.'s coachman is driving quietly along a street when the horse, without warning or any explainable cause, bolts, and in spite of the coachman's utmost efforts, swerves on to the footpath and knocks down B, a passer-by, injuring him severely. Assuming that the coachman was a man of skill and experience, has B any cause of action against A. ? Give reasons for your answer. [11]

27. A. a guest at a shooting party, accidentaly, without intending to do so and without being guilty of negligence or want of care in the use of his gun, shoots B, another guest, in the leg. Has B. any cause of action against A.? [11]

28. Illustrate the principle that a man must be presumed to intend the probable consequences of his voluntary acts or omissions. [14-17]

29. A. wrongfully throws a lighted squib at B, who, in self-defence wards it off so that, without either of them intending it, the squib explodes in C's eye and blinds him. Can C maintain an action for damages against A. and B., or either of them ? [18]

29. (a) If a man scares crows and drives away locusts and they damage a neighbour's crops, is he liable for the damage ? [18]

30. Is the nature of the motive with which the act was done ever an essential ingredient in tort ? Does an evil motive ever make wrongful an act which would otherwise be justifiable ? Does a good motive ever make justifiable an act which would otherwise be wrongful ? [11-12]

31. Distinguish between "malice in fact" and "malice in law." [11-12]

32. In what senses is the word "malice" used in connection with (a) malicious prosecution ; (b) libel and slander and (c) other torts generally ? [13-15]

33. Is it a tort to induce a person (a) to break a contract, (b) to refrain from making a contract ? [13, 180-181]

34. A. walks across B's land under the honest but mistaken belief that there is a public right of way across it Is his belief a good defence to an action for trespass? [9-10]

35. A purchases from B goods which he believes to be B.'s, but which are in fact C.'s property. What is A's liability towards C.? [9-10]

36. What is meant by an Act of State? Discuss, with reference to decided cases, the scope of the rule "there is no Act of State between a sovereign and his subjects." [20-22]

37. What is the difference between a judge of a superior court and a judge of an inferior court as regards immunity from actions for things done by them in their judicial capacity? [23-24]

38. Analyse the provisions of the Judicial Officers Protection Act, and examine the extent of the immunity of judicial officers in India in comparison with it in England. [25]

39. To what extent is the civil remedy in damages interfered with when the wrongful act or omission amounts to a felony? Examine the Indian law. [34-36]

40. A. has innocently bought goods from B., who has stolen them from C. Can C. bring an action against A. without prosecuting B. for the theft? [34-36]

41. To what extent can a duty or right created, or declared, by statute, be enforced at common law; and in what cases is the common law action for damages excluded? [27-28]

42. Where a duty is created by statute for the benefit of the public, is a person, who, by reason of another's neglect of the statutory duty, suffers a loss, entitled to maintain an action for damages in respect of such loss? Give an instance [30-38]

43. Explain and illustrate the distinction between actions in "tort" and in "contract," respectively. Is there any practical importance nowadays in this distinction? [43]

44. If in a railway accident, occurring through negligence on the part of the railway company's servants, a passenger is injured, does his remedy lie in contract or in tort? [43-47]

45. A man pledges a coat at a pawnbroker's and owing to the latter's negligence it becomes ruined by moths. Discuss the question whether the owner's remedy is in contract or in tort. [43-47]

46. What is meant by privity of contract? Has it any application to tort? A man employes a surgeon to attend to his wife. Owing to the surgeon's negligence, the patient is injured. Has she any remedy at law, and, if so, on what principle? [44-46]

47. A., a domestic servant, going by train from London to Birmingham, loses his luggage owing to the negligence of the railway company's servants. His fare had been paid by B, his master. What remedy has A against the Company? [45]

48. A goes to a gunmaker and explains to him that he wants a good, sound gun for the use of himself and his son B. The gunmaker sells him a gun which he warrants to be perfectly sound A few days later B. goes out shooting and the gun bursts and seriously damages his face Has he any remedy, and, if so, on what principle, against the gunmaker? [45]

49. If a person gratuitously undertakes to perform a service for another person, can he be made liable for (a) not performing it, or (b) performing it so negligently that damage results to the other person? Give your reasons. [46]

50. A. intrusts a purse of money to the care of B. who gratuitously undertakes the custody of it Through B.'s negligence the purse and its contents are lost Has A. any remedy against B., and, if so, on what principle? [47]

51. A., walking along the road, is overtaken by a motor car driven by B, a "chauffeur," whom he knows slightly, and who offers him a "lift." A rashly accepts the invitation, and in consequence breaks his arm in an accident (caused solely by B's negligence) which terminates the excursion. Has A. any remedy against B. or B's employer, and, if so, on what principle? [47]

52. Under what circumstances, if at all, is an action for damages maintainable in England in respect of a tort committed abroad? [48-49]

53. Who may be plaintiff in an action for tort? State any exceptions to the general rule. [50-51]

54. Can a husband sue his wife, or a wife her husband, in tort? [50]

55. Can a corporation sue in tort precisely as if it were an individual person? [50]

56. Who may be made a defendant in an action for tort, and what classes of persons are exempt from such liability? [51-52]

57. An infant hires a horse for the afternoon expressly for riding on the roads. He tries it at a fence and breaks its knees. Can he be made liable (a) for the damage done to the horse's knees; (b) for the hire, which he has omitted to pay? [52]

58. Discuss the liability of infants, lunatics, corporations, and trades unions in tort? [52-54]

59. Discuss the liability of the Secretary of State for India for wrongs committed by persons in official service in India. [74]

60. To what extent is a husband liable for torts committed by his wife? Is it ever necessary to join him as a defendant? [59-60]

61. Explain and illustrate the maxim "*qui facit per alium facit per se*" in its application to torts. [63]

62. Explain the maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*" To what extent is it applicable in tort? [64]

63. Explain the doctrine of *Respondent Superior* and give illustrations of its application in tort. [65]

64. If a cabdriver (whose duty it is to drive the cab himself) allows the "fare" to drive, and the latter drives so badly as to collide with and damage a private carriage, is the owner of the cab liable to the owner of the carriage for the damage done; and if so, on what principle? [73]

65. A driver of a cart negligently leaves the cart in charge of a small boy, whose duty it was to go with the cart to deliver parcels, but who had been forbidden to drive. The boy drives the cart and collides with a private carriage. Is the tradesman, who employs the driver and the boy, liable for the damage done to the carriage; and, if so, on what principle? [74]

66. State precisely the liability of a person for the wrongful acts and omissions of a contractor employed by him to do a particular piece of work. [75-76]

67. A railway company was empowered by Act of Parliament to construct a railway bridge over a public highway, and employed a contractor to do the work. A servant of the contractor negligently caused serious injury to a person passing along the highway, by allowing a stone to fall on him. Discuss the liability of the company for the damage done to the injured individual. [78]

68. A company, not authorised to interfere with certain streets, directed their contractor to open trenches therein. The contractor's servant, in doing so, left a heap of stones, over which a person fell and was injured. Discuss the liability of the company for the damage done to this person. [78]

69. A company, being authorised by Act of Parliament to construct a bridge over a navigable river, employed a contractor to do the work. A person, who suffered damage by reason of defects in the construction and working of the bridge, sues the company. On what principle, if at all, is his action maintainable? [78]

70. A. and B. are owners of two adjoining houses, A. being entitled to have his house supported by B.'s soil. B. employs a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertakes the risk of supporting A.'s house during this process, but fails to take the necessary precautions. Is B. liable to A. for the consequent damage to A.'s house; and, if so, on what principle? [79]

71. A. maintains a lamp hanging over a highway for his own purposes. He employs a contractor to repair it; but the latter does his work so badly that soon afterwards the lamp falls down and hurts B., a passer-by. Is A. liable to B in damages; and, if so, why? [80]

72. A contractor, employed to clear and burn brushwood on land belonging to A., negligently and in disregard of express instructions as to the time of lighting the fire, lit it and permitted it to spread on to the land of B. Is A. liable in damages to B. for the injury thus done to B.'s land; and, if so, on what principle? [80]

73. A., being the owner of a carriage, horse, and harness, and losing his coachman at short notice, gets another for the day from a livery-stable keeper, and is driven out by him. Discuss the liability of A. for damage done to a stranger by reason of the negligence or want of skill of this hired driver. [66-67]

74. A. having a carriage, but no horse or harness, hires these for the day from a livery-stable keeper, who also supplies him with a driver on inclusive terms, so that A. does not pay the driver's wages direct to the latter. Discuss the liability of A for damage done by the driver to B.'s carriage in a collision. [66-67]

75. A., having a coachman to spare, lends his services for the day to B., who is short of one. Discuss the liability of A. and B. for damages done to C. by the coachman while driving B.'s carriage and horses. [66-67]

76. A., being the owner of a motor car, leaves it in charge of a "chauffeur" with instructions to call for him at a certain place that afternoon. In A's absence during the morning the "chauffeur" takes his sweetheart for a drive in the car (an event not contemplated by A.), and during the drive negligently collides with and damages B.'s carriage. Discuss A.'s liability to B. for the damage done. [68-69]

77. An omnibus conductor, for the fun of the thing, changes places with the driver and drives the omnibus so unskilfully that he collides with and damages a private carriage. Discuss the liability of the omnibus company. [70, 73]

78. A bank manager, in answer to inquiries by A. as to the financial position of B. (a customer of the bank), replied that B. is a person of sound financial position. This statement was known by the bank manager to be untrue when he made it, and was made, not for his own benefit but for the benefit of the bank, with intent to deceive A. Advise A. as to whether, having suffered loss by acting on the faith of this statement, he has a cause of action against the bank. [192]

79. An omnibus driver, contrary to the express instruction of his employers, drives in such a way as to obstruct a rival omnibus, with a view of increasing the takings of his own. Discuss the liability of his employers. [70]

80. An omnibus driver, out of spite against a rival omnibus, struck the horses of the latter with his whip. Discuss the liability of his employers. [70]

81. What is meant by the doctrine of "common employment"? On what principle is it based and to what extent has it been cut down by modern legislation? Examine the limits of the doctrine, as recognised in Indian law. [239]

82. A butcher's man was ordered to deliver meat from a van. The van, having been overloaded by the negligence of another of the butcher's servants, broke down, and the butcher's man was hurt thereby. Can the butcher's man maintain an action for damages against his employer? [240]

83. Owing to the negligence of the captain of a merchant vessel, one of the crew is seriously hurt. Discuss the liability of the owners. [241]

84. Owing to the negligence of the captain of ship A., it collides with ship B. and one of the crew of the latter ship is seriously injured thereby. Both ships belong to the same owner. Discuss his liability for the damage done to the injured man. [242]

85. A collier is seriously injured by the fall of a stone from the side of the shaft, which has been left in a dangerous state by his employers. Discuss their liability in damages. What must the plaintiff prove in order to succeed in his action? [241]

86. A master orders a servant to take a bag of corn up a ladder which is unsafe; the ladder breaks and the servant falls down and is injured. Discuss the liability of the master, on the alternative assumptions that (a) he knew the ladder was unsafe, but the servant did not; (b) he did not know, but the servant did; (c) both knew; and (d) neither knew nor had the means of knowing. [247, 248]

87. What is meant by the maxim *"volenti non fit injuria"*? Discuss its application to the case of injuries sustained by a servant employed in a dangerous occupation. [243]

88. A passer-by assists a carman in managing a fractious horse. In course of doing so, he himself gets injured owing to the carman's negligence. Discuss the liability of the carman's employer for the damage done to the passer-by on the assumption that the latter was asked by the carman to give his assistance. [73]

89. Explain and illustrate the liability of a partner for the torts of his fellow-partner. [61]

90. One member of a firm libels a stranger. Can the latter sue the firm in damages, and, if so, on what principle? [61]

91. From what period do the Statutes of Limitation commence to run in the case of torts? [109]

92. In 1895 A. began to work coal under the land on which B's house stands. In consequence of this working, a subsidence occurred in 1900, and B's house was damaged. In 1904 B. commenced an action for damages against A. What facts besides the above, would be of importance in deciding the case for or against B's claim? [111]

93. A's furniture was legally seized under an execution by the sheriff and bought by B. a friend, who, out of kindness, left it in A's possession where it remained for ten years, at the end of which A died. B then claimed it, but A's widow pleaded the Statute of Limitations. Discuss their respective claims to the furniture. [111-113]

94. State and illustrate the effect of the fraudulent concealment of a tort on the right of the person injured to maintain an action for damages. [111]

95. In what respects do the Statutes of Limitation differently affect the rights of a person to recover (a) land, (b) goods, of which he has been wrongfully deprived [108, 323]

96. Explain and illustrate the application of the Statutes of Limitation to a continuing tort. [113]

97. What is meant by "disability," in relation to the Statutes of Limitation, and what is the effect of it? [114]

98. To what extent are public officers and authorities specially privileged in relation to actions in tort? Does the privilege extend to their servants and agents? [23. 26. 74]

99. What is the measure of damages in actions for tort (a) in respect of personal injury, and (b) in respect of injury to property ? [92-94]

100. On what principles and under what circumstances, if at all, can the verdict of a jury, in regard to the amount of damages given in respect of a personal injury, be disturbed ? [93]

101. What considerations may be taken into account by the jury in estimating damages in a case of seduction ? [179]

102. What is the proper measure of damages for injury done to a horse through the negligence of a person who had hired it from the owner ? [95]

103. A., a colliery owner, wrongfully worked coal lying under the land of his neighbour B. State precisely the proper measure of damages that should be awarded to B. [95]

104. Explain and illustrate in its application to torts the maxim *"omnia præsumptur contra spoliatorem."* [96]

105. Explain and illustrate what is meant by (a) "consequential damages," and (b) "prospective damages." [96, 98]

106. In an action for personal injury, what kind of consequences of the injury can be taken into account in the assessment of damages ? Give illustrations. [97]

107. What circumstances may be considered by a jury to be in (a) aggravation, and (b mitigation, of damages ? Give illustrations in cases of (1) defamation, (2) malicious prosecution, (3) assault and battery, and (4) trespass. [100-101]

108. What is the legal position of persons who have jointly committed a tort ? [55]

109. What are the effects of—

(a) A judgment being given against one of several tort-feasors ;

(b) A release being given to one of them ;

(c) A covenant not to sue being made with one of them ;

(d) Damages being levied upon one of them on a judgment given against them all jointly ? [55-58]

110. Discuss the proposition that "there is no contribution between tort-feasors." [57]

111. Explain and illustrate the application of the remedy by injunction to various kinds of torts. [103-105]

112. Distinguish between interlocutory and perpetual injunctions as remedies in cases of torts, and illustrate and distinguish the principles on which they will respectively be granted both in England and in India. [104]

129. A. falsely and maliciously tells B., that her husband C. has recently committed a criminal offence. Can C maintain an action for slander against A.? [134]

130. What is meant by "justification" as a defence to an action for libel? On what principle does it depend? [137]

131 What is meant by "fair comment" in relation to the law of libel and slander? Illustrate the limitations to which it is subject. [138-139]

132. Explain and illustrate the expressions "actual malice" and "privileged occasion" in relation to an action for libel or slander. [145-147]

133. Distinguish between "absolute" and "qualified" privilege in relation to libel and slander, and give instances of each. [140-145]

134. What are the functions of a judge and jury respectively in regard to the questions of "privileged occasion" and "privileged communication" in an action for libel? [145]

135. In what respects has the ordinary law of libel been modified in favour of newspaper proprietors and editors? [145-146]

136. C. is an applicant for an appointment in B.'s business. In reply to an inquiry by B. as to C.'s character, A. writes a letter which, amongst other things, contains an untrue defamatory statement about C., made, however, by A. in the belief that it is true, and that he ought to mention it. Having written the letter, A. negligently puts it into a wrong envelope, so that it ultimately reaches D., who informs C of its contents. Can C. maintain an action against A.? [148]

137. To what extent is a person who repeats (a) a libel or (b) a slander, liable equally with the originator of it? [134]

138. A. slandered B. in C.'s hearing. C., without authority, repeated the slander to D., in consequence of which D. refused to trust B. Does an action for slander lie against A., and, if so, why? [135]

139. What is the statutory limitation applicable to actions for libel and slander? [110]

140. Define and analyse "malicious prosecution." Distinguish it from false imprisonment. [154]

141. What is meant by "want of reasonable and probable cause" for instituting a prosecution? In an action for malicious prosecution (a) on whom does the onus lie of proving, and (b) what are the functions of a judge and jury with regard to, the facts material to this part of the case? [159-160]

142. Define "maintenance." In what respects does it differ from "malicious prosecution"? [171]

143. Is the English law of maintenance applicable to India? What are the principles that guide Indian courts in deciding actions for tort of "maintenance"? [173]

144. Illustrate and explain what is meant by a "common interest" in relation to actions for tort of maintenance. [172]

145. What is the legal principle on which actions for seduction are based? [176]

146. Frame and discuss a definition of common law fraud or deceit, as a tort, and distinguish it from such misrepresentation as would, in equity, be a ground for rescinding a contract. [190]

147. Explain the decision in *Derry* v. *Peek*. [191]

148. What is the statutory liability of directors of joint stock companies in regard to untrue statements contained in a prospectus inviting subscriptions for shares? [194-195]

149. Under what circumstances can a man be made liable in tort for the untrue statements of his agent? [192]

150. A., a secretary of a company, by false statements induces B. to take shares in the company. Is the company liable for the fraud of the secretary? Discuss the the decision in *Lloyd* v. *Grace Smith & Co.* [192]

151. Does silence ever amount to fraud? [190]

152. A., an opera-house manager, engages a singer to perform in an opera. B., manager of a rival opera-house, hears of this and offers the singer a sum of money to break her contract with A. and to sing in B.'s opera. She does so, with the result that A. sustains a loss. Can A maintain an action for damages against B., and, if so, on what principle? [182]

153. Define "negligence." Under what circumstances is it wrongful, so as to give rise to an action for damages in tort? Give illustrations. [196]

154. A. lends B. his gun to shoot game with. If the gun explodes and injures B., would A be liable in damages? [209]

155. It is sometimes said that every dog is legally entitled to one bite. Discuss and explain this statement. [233]

155a. While playing in a public park of a municipal Corporation, a child eats a deadly fruit, tempted by its luscious appearance, and dies. Is the Corporation liable? [14]

156. A., a neighbour permitted to cross B.'s land in order to go by a short cut to his own house, goes on to B.'s land in the dark and falls into an unfenced pit. Discuss the circumstances, if any, which would entitle him to maintain an action for damages against B. [201]

157. Explain and illustrate what is meant by "contributory negligence." Is it always a good defence? Give illustrations. [212]

158. An omnibus comes into collision with a hansom cab, both drivers being to blame for negligence in driving. The hansom is damaged and a person in it is injured in the collision. Has (a) the owner of the hansom, or (b) the "fare," any remedy in damages against the omnibus company? [213-214]

159. What is the effect of the decision in *The Bernina* ? [215]

160. A., a landowner, negligently allows a fence on his land adjoining a public highway to get into a rotten condition. B, a little boy, attempts to climb the fence (which he has no right to do); the fence falls down and injures him. Can he recover damages from A. ? [255]

161. Illustrate the principle that in an action founded on negligence the negligence of the defendant must be the proximate cause of the damage. [217]

162. Will (a) negligence, (b) contributory negligence, ever be presumed, or must they be proved in every case ? and, if so, on whom does the onus lie and what are the functions of the judge and jury respectively in relation thereto ? [218]

162a. State the facts and discuss the effect of the decision in *Rylands* v. *Fletcher*. Describe some instances in which the principle of that decision has been applied. [224 *et seq.*]

162b. State shortly the liability of a keeper of animals or producer of fire for injury caused by them. [231]

162c. How does *vis major* affect the law of negligence, particularly when it is co existent with the defendant's default ? [227]

163. Define "public nuisance," and give illustrations of each. [253]

164. Under what circumstances does a public nuisance give rise to an action for damages ? [253]

165. "Once a highway, always a highway." Explain this maxim, and discuss its applicability to India. [257, 258]

166. What is the liability in tort of a highway authority for injury to an individual by reason of the highway being allowed to fall into disrepair ? [40-42]

167. In an action for damages in respect of a nuisance, is it a good defence to show that the plaintiff knew of it and nevertheless deliberately went to live in its vicinity ? [267]

168. How, if at all, can the right to commit a nuisance be acquired ? [269]

169. What is the liability of the landlord and tenant respectively by reason of the premises being in such a ruinous condition as to constitute a nuisance ? [201, 268]

170. Give illustrations of nuisances affecting incorporeal hereditaments. [274]

171. To what extent is a man entitled to lateral support from his neighbour's land ? [276]

172. Explain what is meant by disturbance of a right of light. How can an easement to light be acquired, and what constitutes a disturbance of the easement ? Point out the difference between English and Indian law. [280]

173. Explain and illustrate the law relating to rights to water. [287]

174. Explain and illustrate what is meant by the "abatement" of a nuisance. Under what circumstances must this remedy be preceded by notice to the person committing the nuisance ? [272]

175. Branches of a tree growing in A.'s garden overhang the intervening wall and spread over into B.'s garden. Is B. entitled to cut them down ? [273]

176. What are the rights and remedies of a reversioner in respect of nuisances to the property ? [271]

177. Define and illustrate—

(a) Assault ;

(b) Battery ;

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Can a threat ever amount to an assault ? [294 *et seq.*]

178. What is mayhem ? [294]

179. What are the defences to an action founded on assault, battery or false imprisonment ? Give illustrations. [299-302]

180. Under what circumstances does an action lie against a magistrate who has exceeded his jurisdiction and wrongly imposed a sentence of imprisonment ? [302]

181. Under what circumstances can (a) a justice of the peace, (b) a constable, and (c) a private individual, lawfully arrest a person ? Give illustrations. [303-308]

182. What is a trespass *quare clausum fregit* ? Give illustrations. [311]

183. What are the defences to an action from trespass to another man's land ? Explain what is meant by the plea of *liberum tenementum*. [313]

184. What is meant by a trespasser *ab initio* ? Explain the decision in the *Six Carpenter's Case*. Does the principle apply to goods as well as to land ? [313]

185. What interest in land must a plaintiff have in order to maintain an action for trespass ? Can an action for trespass be maintained by one of two joint owners against the other ? [314]

186. What is distress *damage feasant* ? To what extent is it recognised in India ? [319]

187. Define and illustrate "dispossession." [320]

187a. Discuss if a suit can be maintained on a mere possessory title. [321]

188. To what extent can either of the parties to an action for the recovery of land set up *jus tertii* ? [321]

189. What is the period of limitation for actions for the recovery of land, and when does it begin to run? [319]

190. Define and illustrate trespass to goods. What is wrongful conversion? [325]

191. Under what circumstances does a bonâ fide purchaser of goods from a person who obtained them fraudulently from the true owner get a good title to them? [325]

192. What is the doctrine of sale in market overt? How far is it current in India? [328-9]

193. Illustrate possible defences to an action for trespass to another's goods. [330]

194. What is meant by (a) "constructive possession" and (b) "possession by relation"? [331]

195. Explain the decision in *Armory* v. *Delamirie*. [335]

196. A. lends an umbrella to B., who leaves it in the hall of his club, whence it is removed by C., who now claims that it is his. Which of the two, A. or B., has the right to maintain an action against C.? [335]

197. Under what circumstances can one joint owner of a chattel maintain an action for trespass in respect of it against the other joint owner? [337]

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